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

THE PEOPLE OF THE STATE OF NEW YORK
By ERIC T. SCHNEIDERMAN, Attorney General of the State of New York,

Plaintiff,

-against-

BARCLAYS CAPITAL INC. and
BARCLAYS PLC,

Defendants.

Index No.: 451391/2014

BARCLAYS' MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT

July 24, 2014

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PRELIMINARY STATEMENT

This case is about purported "false advertising" by Barclays regarding Barclays LX, an Alternative Trading System ("ATS") used by highly sophisticated investors. Relying primarily on snippets of marketing brochures and brief quotes in news articles, the New York Attorney General ("NYAG") alleges that Barclays misled LX customers about the extent of "aggressive" trading in LX by High Frequency Traders ("HFTs") and about Barclays' efforts to protect customers from that trading.

Fundamentally, the Complaint fails to identify any fraud—establishing no material misstatements, no identified victims, and no actual harm. The Complaint ignores that LX's customers are highly sophisticated traders and asset managers responsible for investing millions or billions of dollars of assets, who execute trades across multiple markets and ATSs, are capable of closely monitoring the quality of execution they receive based on extensive data, and can select from multiples platforms on which to execute their trades based on detailed execution data, not on the glossy marketing brochures or quotes from magazine articles the NYAG cites.

Moreover, the Complaint is based on clear and substantial factual errors. Unfortunately, at this stage of the litigation, the pleading standards limit Barclays' ability to rebut those factual errors—but should this litigation proceed to the next stages, Barclays will introduce evidence demonstrating how far off base these allegations are. For present purposes, though, the very marketing documents and emails from which the Complaint selectively quotes, along with the Complaint's other fatal flaws, are sufficient to require dismissal of this "fraud" action. The Court should dismiss this Complaint for three independent reasons:

First, in seeking to extend its regulatory authority to trading platforms, the NYAG ignores that the plain text of the Martin Act—on which the NYAG's claims are predicated—is limited to actions for fraud in the purchase or sale of "securities," and does not extend to all actions related to finance. Here, the allegations solely concern the functioning of LX as an alternative trading platform, and do not identify any misstatements concerning any "security." Moreover, to date, only the U.S. Securities and Exchange Commission ("SEC") has regulated ATSs—which the Complaint estimates handle over 40% of all equity trading in the United States—and so expanding the Martin Act to cover ATSs threatens conflict between it and the Securities Exchange Act of 1934 ("Exchange Act"), which specifically authorizes the SEC to develop national regulations for ATSs such as LX. The NYAG's claims are an attempt to impose new regulations that are in addition to, and potentially contradict or supplant, the SEC's judgments about the regulations to impose on this important mechanism to the U.S. economy. The Court should not create such unnecessary conflicts with federal law, and should reject this unnecessary expansion of the Martin Act.

Second, even if the NYAG had authority to bring suit here, its claims fail on the merits. The Complaint does not allege which (if any) of Barclays' highly sophisticated clients saw these supposed misstatements, when (if ever) they saw them, whether the marketing flyer and news quotes were material to those clients (who had access to much more significant and detailed information about LX), and whether those clients were harmed by them. Accordingly, the Complaint fails to meet its burden of pleading misstatements that are particularized and material. The Complaint seeks to overcome these defects with statements purportedly made by unidentified former Barclays employees—ignoring the rule that courts should be wary of anonymous, self-interested sources. But without allegations setting forth the circumstances of the supposed fraud, the Court cannot infer that any actionable fraud even occurred. For this reason alone, the Complaint must be dismissed.

This lack of particularity is unsurprising, given that even a cursory examination of the materials cited in the Complaint demonstrates that they were intended only for sophisticated clients and that they transparently disclosed the volume of HFT and "aggressive" trading on LX. Contrary to the Complaint's allegations, the very Barclays marketing materials on which the NYAG relies made clear that HFTs were a substantial part of LX traders and transparently marketed LX as a platform on which clients could *benefit* from the liquidity provided by HFTs, while having the *option* of reducing exposure to "aggressive" order flow.

To the extent the Complaint alleges that Barclays misrepresented the level of "aggressive" trading in LX, those allegations are premised on mischaracterizations of documents portrayed in the Complaint in a way that removes the important information and context Barclays provided about HFTs and "aggressive" trading in LX. For example, the chart on the marketing flyer attacked by the NYAG for falsely representing the number of HFTs trading on LX was clearly labeled "Sample," and never said that it depicted actual data for any particular client population, or over any particular time frame, and could not plausibly be interpreted that way. Indeed, on the very same page of that flyer, Barclays disclosed that 35% of the traders on LX were HFTs.

Third, the Complaint wrongly seeks damages and restitution for the People of the State of New York without alleging that the People—let alone any LX clients—actually suffered any harm. But under New York law, litigants bringing Martin Act claims must allege damages resulting from the defendants' alleged misrepresentations.

For each of these reasons, the Court should dismiss the Complaint with prejudice.

ALLEGATIONS OF THE COMPLAINT[1]

Barclays Capital Inc. ("BCI") is a broker-dealer, with a principal place of business in New York City. (Compl. ¶ 6.) BCI provides brokerage services to a variety of clients, including institutional investors, mutual funds, and other "buy-side" clients. (Compl. ¶ 7.) BCI is a subsidiary of Barclays PLC (together with BCI, "Barclays"), which is registered and headquartered in London. (Compl. ¶¶ 1, 6.)

A. Alternative Trading Systems

In 1975, Congress amended the Exchange Act to give the SEC responsibility for promoting a new "national market system," including "exchange[s]." Act of June 4, 1975, Pub. L. No. 94–29, § 7, 89 U.S. Stat. 97, 111-12 (codified in scattered sections of 15 U.S.C.); Act of 1975, sec. 7, § 11A (codified at 15 U.S.C. § 78k–1(a)). Since then, the SEC has created a comprehensive regulatory framework for the national market system that includes national securities exchanges (such as the New York Stock Exchange and NASDAQ) and ATSs. LX is an ATS subject to SEC Regulation ATS. *See* 17 C.F.R. §§ 242.300 -.303.

ATSs perform many of the same functions as exchanges. *See* 15 U.S.C. § 78c(a)(1); 17 C.F.R. § 240.3b-16(a). Like any other exchange, ATSs have computerized systems for receiving and matching orders, and a number of different market participants can trade with one another through the system. (Compl. ¶¶ 8-10.) The SEC has made the conscious decision not to require many ATSs, known as "dark" pools, to provide pricing data to the public

[1] In assessing the allegations of a complaint, "the [C]ourt may consider [the complaint and the] documents referenced in [the] complaint, even if the pleading fails to attach them." *Alliance Network*, *LLC* v. *Sidley Austin LLP*, 43 Misc. 3d 848, 852 n.1 (Sup. Ct., N.Y. Cnty. 2014); *see also Pullman Grp.*, *LLC* v. *Prudential Ins. Co.*, 288 A.D.2d 2, 3 (1st Dep't 2001) (affirming grant of motion to dismiss based on "the allegations of the complaint and the contents of the documents referenced therein").

in real time in the same way that a national securities exchange must. (Compl. ¶ 10; *compare* 17 C.F.R. § 242.301(b)(3) (limited data requirements for ATSs), *with* 17 C.F.R. § 242.602(a) (extensive requirements for exchanges).) The SEC's decision to impose lesser disclosure requirements on ATSs reflects both the SEC's decision to "nurture" ATSs to promote competition in securities trading to reduce costs to investors and its recognition that keeping trading data confidential is beneficial for many investors—especially the "institutional investors" the NYAG purports to be protecting in this action. *See* SEC Order, 73 Fed. Reg. 74770, 74776 n.206 (Dec. 9, 2008); *see also* SEC Release No. 34-61358, Concept Release on Equity Market Structure, 75 Fed. Reg. 3594, 3597, 3612 (proposed Jan. 21, 2010).

In particular, the SEC-approved confidentiality that "dark" pools provide is beneficial to institutional investors, as it reduces the risk that those investors will move the market price when trading. For example, when an institutional investor places a sell order on a generally "lit" pool, such as the New York Stock Exchange, the exchange immediately broadcasts to the market the quantity that the investor is seeking to sell. (Ex. 1 (June 6, 2013 online news article in HedgeWeek on dark pools ("HedgeWeek Article")).)[2] In response to the supply of shares for sale, the market price may drop—causing the institutional investor to receive a lower price for the shares than it would absent public disclosure of its order. "Dark" pools (such as LX) do not publicly disclose order information (such as prices or size) in real time, so the institutional investor seeking to make a trade can do so with a lower risk of moving the market price. (*Id.*) Orders can match against offsetting orders available at the same price, but the price and size of orders sent to dark pools is not disclosed publicly. Recognizing the

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[2] All references to "Ex." numbers refer to the exhibits to the Affirmation of Jeffrey T. Scott, dated July 24, 2014. Each of these exhibits was referenced in the Complaint in the paragraphs listed in Appendix A to this brief.

advantages of “dark” pools, some “lit” exchanges (like NASDAQ) offer certain order types that allow investors to make “non-lit” trades over those exchanges. *See* Self-Regulatory Organizations; NASDAQ OMS BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Add Routing Functionality to the NASDAQ OMX BX Equities Market, SEC Release No. 34-68840, 78 Fed. Reg. 9961 (Feb. 12, 2013). According to the Complaint, “[i]t is estimated that, today, over forty percent of all U.S. equities trades are executed in dark pools.” (Compl. ¶ 10.)

B. High-Frequency Traders

HFTs are the largest subset of Electronic Liquidity Providers (“ELPs”), which are high-frequency and multi-strategy firms that use computer algorithms to make markets. (Compl. ¶ 11.) According to the Complaint, some HFTs analyze market data feeds from “lit” pools to detect when a large investor has placed a large order in a security. (Compl. ¶ 14.) The Complaint alleges that some HFTs may then try to “trade ahead” of institutional investors by buying available shares before the institutional trader can, and then selling the shares to the institutional trader for slightly more than what the HFT paid to buy them. (Compl. ¶¶ 11, 13-14.)

Although some HFTs have been criticized for their trading strategies, the SEC has noted that many “HFT strategies appear to have beneficial effects on market quality, such as by reducing spreads and reducing intraday volatility on average.” Div. of Trading & Markets, U.S. Sec. & Exch. Comm’n, *Equity Market Structure Literature Review Part II: High Frequency Trading* 9 (2014); *see also* Concept Release on Equity Market Structure, 75 Fed. Reg. at 3599 (“[S]ome [high frequency trading] strategies may benefit market quality and long-term investors and others could be harmful.”). Indeed, the SEC has noted that it “should not . . . prohibit algorithmic trading.” Mary Jo White, Chair, U.S. Sec. & Exch. Comm’n, Enhancing Our Equity Market Structure, Speech at the Sandler O’Neill & Partners, L.P. Global Exchange and

Brokerage Conference (June 5, 2014), *available at* http://www.sec.gov/News/Speech/Detail/-Speech/1370542004312.

C. Barclays LX

LX is one of several dozen ATSs currently operating in the United States. (Compl. ¶¶ 10, 15.) LX's clients consist of three major groups: (i) institutional clients, (ii) broker-dealers (including Barclays' internal market makers), and (iii) ELPs (including HFTs). (Ex. 2 (June 2013 Liquidity Profiling Marketing Flyer ("LP Marketing Flyer"), referenced in Compl. ¶ 35).)

All three of the client groups that use LX are highly sophisticated. As the Complaint acknowledges, HFTs "use[] sophisticated computer programming" to implement complex strategies. (Compl. ¶ 11.) Registered broker-dealers, by definition, are professionals engaged in the business of buying or selling securities or effecting securities transactions. 15 U.S.C. § 78c(a)(4)(A), (a)(5)(A). The institutional clients who use LX are also sophisticated: many access LX "straight from their own algo[rithm]s" (Ex. 3, at 2 (Electronic Trading Products Internal FAQs ("Internal FAQs"))), and all of them manage millions (or even billions) of dollars in assets. Indeed, LX's marketing materials referenced in the Complaint make clear that LX services are "directed at persons who are professionals and [are] not intended for retail customer use." (*E.g.*, Ex. 4, at 14 (July 2013 Marketing Deck, referenced in Compl. ¶ 27), Ex. 2 (June 2013 LP Marketing Flyer).) The SEC has also noted that retail investors do not use ATSs and that ATSs are used "only [by] those market participants who, due to their size or sophistication" obtain better execution in ATSs than they would in traditional exchanges. Regulation of Exchanges and Alternative Trading Systems, Release No. 34-40760, 63 Fed. Reg. 70844, 70865, 70868 (Dec. 22, 1998).

Clients may send orders to LX via Barclays' algorithms, Barclays' order router, or directly via an electronic entry connection. (Ex. 4, at 3 (July 2013 Marketing Deck).)[3] Broadly speaking, there are two types of interactions that may occur in LX. Clients may "provide" liquidity by placing an order to buy or sell at a specific price, which will be posted in LX's order book. Conversely, clients may "take" liquidity by submitting an order to execute against the orders that liquidity providers have posted in LX's order book. (Compl. ¶ 64; Self-Regulatory Organizations; NYSE Arca, Inc.; Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data, SEC Release No. 34-59039, 73 Fed. Reg. 74,770, 74,783 (Dec. 9, 2008).) LX continuously and anonymously matches orders, effecting executions whenever there is a buyer and seller willing to trade at the same price.

D. LX Liquidity Profiling

In 2011, recognizing that different LX clients within the same broad categories (ELP, broker-dealer, and institutional) often had different kinds of order flow, and that some clients had different levels of appetite for the various kinds of order flow, Barclays made enhancements to LX and introduced a new service called "Liquidity Profiling." (Ex. 6, at 8-10 (December 2011 Marketing Deck).) Barclays told investors that the ELP segment "contains some . . . clients that provide beneficial liquidity that should be accessed by all clients" and also contains some "aggressive" order flow. (*Id.*, at 8.) Barclays sought to segment order flow that

[3] The same security may be traded on a number of different exchanges and ATSs like LX. When a client sends an order to the Barclays order router, the router immediately sends the order to the trading venue (or venues) that have a high probability of filling the order. (Ex. 5, p. 24 (Execution Sales Training Materials Excerpt).) Barclays' algorithms are computerized models that optimize trades, often by executing an order over a period of time in an effort to improve execution and reduce "information leakage" (*i.e.*, the possibility that other traders will become aware that a client is in the process of making a large trade). Many clients have their own routers or algorithms, which will send orders directly to LX via an electronic entry connection when the client decides that LX is the best venue for a particular order. (Ex. 3, at 2 (Internal FAQs).)

was taking liquidity to better distinguish beneficial liquidity from "aggressive" liquidity, so that Barclays' institutional investor clients could benefit from "neutral" or "passive" liquidity while reducing their exposure to "aggressive" ELPs (if they chose to do so). (*Id.*)

As part of its Liquidity Profiling program, Barclays considered certain client-specific metrics (and other factors) to determine whether a client's order flow was "aggressive":

1. **One-second take alpha**: This is a calculation of how much the price changed, on average, in the first second after the trader executed against another trader's passive order. (Ex. 4, at 5 (July 2013 Marketing Deck).) A positive value means that the price of securities moves in favor of the trader, on average, in the one second after trading. This could indicate that the trader is trying to benefit from short-term price changes.

2. **Normalized order size**: A calculation of a trader's average order size in each security relative to the average execution in that security. (*Id.*) Lower values indicate that the trader places small orders, which may be an indication that the trader is using an aggressive trading strategy.

Based on these metrics and other factors, Barclays grouped the order flow of LX traders into six categories. (Ex. 7, at 3; Compl. ¶ 26 (March 2013 Marketing Deck).) Traders who appeared to be conducting the "most aggressive, predatory trading activity" were rated "0" or "1," neutral traders were rated "2" or "3," and those who conducted the "safest, most passive, long-term investor-like trading activity" were rated "4" or "5." (Compl. ¶ 26.) In marketing materials, Barclays described the factors it considered as a part of its Liquidity Profiling program and stated that it was "continu[ing]" to analyze additional factors that could be relevant to assignments. (*See*, *e.g.*, Ex. 6, at 10 (December 2011 Marketing Deck); Ex. 8, at 11 (December 2012 Marketing Deck).) Accordingly, Barclays did not commit to employ any particular formula or precise boundary in grouping order flow. (Ex. 4, at 5 (July 2013 Marketing Deck) (noting that "[a]nalysis of Liquidity Profiling factors is ongoing" and the factors could be expanded "to include [other] metrics").) The marketing materials also clearly disclosed that, although 35% of LX consisted of ELPs, Barclays regarded only 9% of LX activity as "aggressive" in its profiling. (Ex. 2 (June 2013 LP Marketing Flyer).)[4]

By categorizing order flow, Barclays also allowed LX clients the choice of opting out of interacting with "aggressive" order flow. (Compl. ¶ 26.) LX clients had the ability to block an individual counterparty, a type of counterparty, or a particular segment of flow. (Ex. 3 (Internal FAQs).) For example, a client could block "aggressive" flow from executing against their orders; or a client could block specific categories of participants such as the client's own affiliates. (Ex. 10, at 9 (January 2011 Marketing Deck) (noting that Liquidity Profiling "puts clients in control and aggressive flows can be suppressed by clients").) These choices enabled clients to reduce their exposure to aggressive order flow. But clients remained free to interact with such "aggressive" flow if they wished to do so (and many do).

Barclays publishes monthly "LX Statistics" on its website disclosing, among other things, the average daily volume executed on LX, trade executions broken down by sector, and the percentage of "passive," "mid," and "aggressive" trades occurring each month. LX clients also can request quarterly charts showing what percentage of their trades involved counterparties who send aggressive, neutral, or passive flow, and information about whether the clients' own behavior was scored as passive, neutral, or aggressive. (Ex. 4, at 6 (July 2013 Marketing Deck); Ex. 11 (March 21, 2013 online news article in Institutional Investor ("Institutional Investor Article") quoting a Barclays employee).)

[4] This number was updated over time. An April 2014 version of the flyer noted that, at that time, 6% of the trading was considered "aggressive." (Ex. 9.)

E. The Alleged Misstatements

The Complaint alleges that Barclays violated the Martin Act, Gen. Bus. Law § 352(1), and Executive Law § 63(12) by making five general categories of purported misrepresentations related to: (i) a Sample Liquidity Landscape chart in a two-page marketing flyer ("Sample Liquidity Landscape Chart"); (ii) another chart in the same flyer regarding the percentage of "aggressive" trading activity in LX; (iii) the extent to which Liquidity Profiling protected clients from predatory trading by "polic[ing] trading behavior" and responding with corrective action; (iv) how Barclays routed client orders to competing trading venues for execution, including whether Barclays routed client orders in a manner that was not biased in favor of any particular trading venue; and (v) Barclays' treatment of HFTs on the platform. (Compl. ¶¶ 33-47, 48-50, 51-67, 68-82, 83-88.) As discussed below, Barclays was transparent in all these areas.

LEGAL STANDARD

To survive "a pre-answer motion to dismiss . . . for failure to state a cause of action . . . the complaint must contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory." *MatlinPatterson ATA Holdings LLC* v. *Fed. Express Corp.*, 87 A.D.3d 836, 839 (1st Dep't 2011) (internal quotation marks omitted). Although the court generally assumes the truth of the allegations in the Complaint, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration." *Simkin* v. *Blank*, 19 N.Y.3d 46, 52 (2012) (internal quotation marks omitted).

A claim for fraud or misrepresentation under the Martin Act requires a misstatement (i) that was "false or misleading when made," (ii) "misleading in a material way," and (iii) that involved a "securities transaction[] originating 'within or from' New York." *People ex rel. Cuomo* v. *Charles Schwab & Co.*, 33 Misc. 3d 1221(A) at *3-*8 (Sup. Ct., N.Y. Cnty. 2011) (dismissing NYAG Exec. Law § 63(12) claim), *aff'd in part*, *modified in part*, 109 A.D.3d 445 (1st Dep't 2013). A fact is material only if it "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *State* v. *Rachmani Corp.*, 71 N.Y.2d 718, 726 (1988) (quoting *TSC Indus.*, *Inc.* v. *Northway*, *Inc.*, 426 U.S. 438, 449 (1976)) (emphasis omitted).

Because a Martin Act claim alleges a "fraud or mistake," "the circumstances constituting the wrong [must] be stated in detail" in the Complaint. N.Y. C.P.L.R. 3016(b). To satisfy this requirement, a complaint must "allege specific facts with respect to the time, place, or manner in which defendants-appellants made the purported misrepresentations," including "which employee . . . purportedly made them." *Riverbay Corp.* v. *Thyssenkrupp N. Elevator Corp.*, 116 A.D.3d 487, 488 (1st Dep't 2014); *Eastman Kodak Co.* v. *Roopak Enters.*, *Ltd.*, 202 A.D.2d 220, 222, 608 N.Y.S.2d 445 (1st Dep't 1994). "[T]he purpose underlying the statute is to inform a defendant of the complained-of incidents," *Eurycleia Partners*, *LP* v. *Seward & Kissel*, *LLP*, 12 N.Y.3d 553, 559 (2009), and to prevent "litigation of baseless claims." *Simcuski* v. *Saeli*, 44 N.Y.2d 442, 453 (1978).

The First Department has held that Martin Act claims brought by the NYAG must be dismissed when, as here, the complaint fails to meet its pleading burden. *See*, *e.g.*, *People ex rel. Cuomo* v. *Charles Schwab & Co.*, 109 A.D.3d 445 (1st Dep't 2013).

ARGUMENT

I. THE NYAG LACKS AUTHORITY UNDER THE MARTIN ACT TO BRING CLAIMS CONCERNING LX.

A. The Martin Act Does Not Apply to the Marketing and Operation of a Trading Platform.

The NYAG has no authority under New York law to bring lawsuits concerning statements about trading venues like LX. The Martin Act only covers actions "in the issuance, exchange, purchase, sale, promotion, negotiation, advertisement, investment advice or distribution within or from this state, of any stocks, bonds, notes, evidences of interest or indebtedness or other securities." N.Y. Gen. Bus. Law § 352. Accordingly, the New York Court of Appeals has enjoined the NYAG from attempting to enforce the Martin Act in connection with interests other than "securities." *All Seasons Resorts*, *Inc.* v. *Abrams*, 68 N.Y.2d 81, 95 (1986); *see also J. Henry Schroder Bank & Trust Co.* v. *Metro. Sav. Bank*, 117 A.D.2d 515, 516 (1st Dep't 1986) (Martin Act does not cover loan participation agreements); *Vorrius* v. *Harvey*, 570 F. Supp. 537, 541 (S.D.N.Y. 1983) (same).

In particular, to determine what "constitute[s] a 'security'" under the Martin Act, the New York Court of Appeals has "expressly adopted" the federal *Howey* test. *People* v. *First Meridian Planning Corp.*, 86 N.Y.2d 608, 618 (1995) (citing *S.E.C.* v. *W.J. Howey Co.*, 328 U.S. 293 (1946)). Under *Howey*, a security is "a contract, transaction, or scheme whereby a person [1] invests his money [2] in a common enterprise and [3] is led to expect profits solely from the efforts of the promoter or a third party." *Id.* at 619 (quoting *Howey*, 328 U.S. at 298-99) (alterations in original). In keeping with this test, the Martin Act lists several examples of "securities," including "oil and mineral deeds," "negotiable documents of title," and "foreign currency orders, calls or options." N.Y. Gen. Bus. Law § 352.

Under this test, LX plainly is not itself a "security." In order to earn profits trading in LX, clients must expend effort in selecting suitable securities, formulating and managing their trading strategies and monitoring their portfolios. LX simply facilitates transactions. That precludes application of the Martin Act here. As the First Department has recognized, the Martin Act is only applicable when the purchasers of a "security" are "rel[ying] . . . [on] the promoters to produce profits." *People* v. *Fleishman*, 163 A.D.2d 148, 149 (1st Dep't 1990). LX is not a "security" under the Martin Act, because LX clients do not "expect profits solely from the efforts of" the promoters of LX. *Id.*; *Cruse* v. *Equitable Sec. of New York*, *Inc.*, 678 F. Supp. 1023, 1027 (S.D.N.Y. 1987) (holding that a trading account, in which the investor must decide which trades to make, is not a "security").

Because the LX trading venue is not a "security," any alleged misrepresentations about LX, and the services it provides, are not misrepresentations made "in the issuance, exchange, purchase, sale, promotion, negotiation, [or] advertisement, . . . *of any . . . securities*." N.Y. Gen. Bus. Law § 352 (emphasis added). None of the alleged misrepresentations by Barclays involved "fraud in the making of an *investment decision*." *E. Midtown Plaza Hous. Co.* v. *Cuomo*, 20 N.Y.3d 161, 170 (2012) (emphasis added) (quoting 3 Thomas Lee Hazen, Sec. Regulation § 12.6(1) at 557 (6th ed. 2009)); *see also S.E.C.* v. *Goble*, 682 F.3d 934, 943 (11th Cir. 2012) (holding that a misrepresentation that affects "an individual's choice of broker-dealers" does not affect an "investment decision"). Accordingly, any misrepresentations alleged in the Complaint are outside the scope of the Martin Act.

Federal courts have recognized that misrepresentations made by a broker-dealer about the manner in which trades are *executed* cannot constitute *securities* fraud. *See Abada* v. *Charles Schwab & Co.*, 127 F. Supp. 2d 1101 (S.D. Cal. 2000); *see also Shaw* v. *Charles*

Schwab & Co., 128 F. Supp. 2d 1270 (C.D. Cal. 2001). These cases are persuasive authority because, when interpreting the Martin Act, New York courts "have repeatedly found it appropriate to be guided by the decisions of federal courts interpreting federal blue sky laws." *E. Midtown Plaza*, 20 N.Y.3d at 170.

In *Shaw*, the Court held that a fraud claim was not "in connection with" securities, because the "Plaintiffs [did] not allege that Defendant's fraud induced them to invest in particular securities," but merely "induced [plaintiffs] to select Defendant as their broker [for trading] rather than some other brokerage firm." 128 F. Supp. 2d at 1274. The Court noted that this alleged fraud related "to the vehicle by which [the defendant] delivered securities rather than the securities themselves" and was not "intrinsically related to the securities being traded." *Id.*; *see also id.* at 1273 (noting that the "purported fraud should have some relation to the securities' 'intrinsic nature'").

Similarly, in *Abada*, plaintiff alleged that he opened a trading account with defendant based on defendant's misrepresentation "that [defendant] would provide fast, high quality execution of trades." 127 F. Supp. 2d at 1103. The court rejected the contention that the fraud was "in connection with" a security, noting that the losses claimed by the plaintiff related to the defendant's processing of orders, not "misrepresentations concerning the risk of a particular investment or investment system." *Id.* Accordingly, any "fraud" was not fraud "in connection with" a security. *See also LaSala* v. *TSB Bank*, *PLC*, 514 F. Supp. 2d 447, 474 (S.D.N.Y. 2007) (noting that a broker-dealer's fraudulent charge must be an "intrinsic component of [a] security" in order for it to meet the "in connection with" requirement (citing *Winne* v. *Equitable Life Assurance Soc'y*, 315 F. Supp. 2d 404, 412 (S.D.N.Y. 2003))). The same rationale applies here. Because the alleged misrepresentations related solely to the manner in which Barclays processed trades for clients—and did not relate to any investment decision in a security—the alleged misrepresentations fall outside the Martin Act.[5]

B. Allowing the NYAG to Bring Suit Here Threatens the National Uniformity of Regulations Over ATSs that Congress Wanted.

Construing the Martin Act to cover alleged fraud in the promotion of trading venues such as ATSs—which the NYAG alleges clear over 40% of all equities trading in the United States (Compl. ¶ 10)—would raise a serious potential conflict with Congress's objective of having the SEC establish uniform, national standards for exchanges and ATSs. The Court should avoid this conflict by recognizing that the Martin Act is limited to "securities."

Congress amended the Exchange Act in 1975 to provide for comprehensive regulation of exchanges. The amendments gave the SEC "broad and flexible authority to shape [the] new market system." *Guice* v. *Charles Schwab & Co.*, 89 N.Y.2d 31, 40 (1996) (internal quotation marks omitted) (emphasis omitted) (quoting Sen. Rep. No. 94–75, at 2, *reprinted in* 1975 U.S.C.C.A.N. 179, 180). The comprehensive "regulatory structure" that the SEC adopted for exchanges[6] later included rules governing the operations of ATSs. Under the SEC rules,

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[5] Moreover, even if this Court determines that Barclays' statements concerning the LX trading platform were made in the purchase or sale of a security, the Complaint nowhere alleges that such purchases or sales meet the Martin Act's jurisdictional requirement of being "within or from this state." N.Y. Gen. Bus. Law § 352. The Complaint does not allege that LX is located in New York or that any of LX's customers placed their trades within or from New York. This failure is fatal to the NYAG's claims, as it does not meet the pleading requirements under the Martin Act, and New York courts have held for more than a century that this State's laws presumptively do not apply outside the territorial jurisdiction of the State. *Crowley* v. *Panama R.R. Co.*, 30 Barb. 99, 107 (N.Y. Sup. Ct., Gen. Term. 1859) ("The general proposition is undoubted and indisputable, that the statutes of one state have no force . . . beyond the territorial limits of the state."); *see also State of New York ex rel. Abrams* v. *Gen. Motors Corp.*, 547 F. Supp. 703, 705-06 (S.D.N.Y. 1982) (noting that a state's interest is in the "maintenance of the integrity of markets and exchanges *operating within its boundaries*" (internal quotation marks omitted) (emphasis added)).

[6] Submission for OMB Review, 79 Fed. Reg. 6236, 6237 (Feb. 3, 2014).

ATSs must, among other requirements, be operated by registered broker-dealers[7] and "subject to comprehensive regulation under the . . . Exchange Act,"[8] including filing, registration, and disclosure requirements, "fair access" provisions, order-handling rules, and specific operational requirements.[9] After adopting Regulation ATS, the SEC has, from time to time, "comprehensively reconsidered the regulatory treatment of alternative trading systems"[10] and has frequently revisited the rules governing ATSs.[11]

In light of the comprehensive federal regulation of exchanges and ATSs, the New York Court of Appeals has recognized that state law regulation of securities trading creates a risk of conflict with the federal objective of uniform national regulation. *See Guice*, 89 N.Y.2d at 45. In *Guice*, retail investors sued brokers who allegedly failed to disclose that they had received "order flow payments" in exchange for routing the investors' orders to particular trading venues. The First Department allowed the plaintiffs' suit to proceed on the theory that "'full and frank disclosure' [of the payments] ha[d] not been made" to the plaintiffs. *Id.* at 38 (quoting 214 A.D.2d 53, 55 (1st Dep't 1995)). The Court of Appeals reversed, holding that even a suit "based

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7 17 C.F.R. § 242.301.

8 Duties of Brokers, Dealers, and Investment Advisers, SEC Release No. 34-69013, 78 Fed. Reg. 14848, 14849 (Mar. 7, 2013).

9 17 C.F.R. § 242.301 (requiring Form ATS and Form ATS-R disclosures); SEC Release No. 34-71341, 79 Fed. Reg. 4213, 4213 (Jan 17, 2014) (requiring disclosure of weekly trading volume statistics).

10 Disclosure of Order Routing and Execution Practices, SEC Release No. 34-43084, 65 Fed. Reg. 48406, 48420 (proposed Aug. 8, 2000), *adopted by* Disclosure of Order Execution and Routing Practices, 65 Fed. Reg. 75414 (Dec. 1, 2000) (codified at 17 C.F.R. pt. 240).

11 Indeed, in January 2014, the SEC granted accelerated approval to a proposed Financial Industry Regulatory Authority ("FINRA") rule that added ATS disclosure requirements. SEC Release No. 34-71341, 79 Fed. Reg. at 4213. In May 2014, the SEC approved a FINRA rule that would make the information in those ATS disclosures available to the public for a reasonable fee. SEC Release No. 34-72280, 79 Fed. Reg. 32351 (May 29, 2014).

solely on inadequate or absent disclosure" was "preempted by the 1975 amendments to the Securities Exchange Act and implementing SEC regulations." *Id.* at 38-39.

The Court of Appeals explained that, in the 1975 amendments to the federal securities laws, "Congress made specific findings that it was in the public interest to assure 'economically efficient execution of securities transactions; [and] fair competition among brokers and dealers, among exchange markets, and *between exchange markets and markets other than exchange markets*'" (such as ATSs). *Id.* at 40 (quoting Act of June 4, 1975, Pub. L. No. 94–29, § 7, 89 U.S. Stat. 97, 111-12 (codified at 15 U.S.C. § 78k–1(a)(1)(C))) (emphasis added) (alteration in original). The Court of Appeals was "convinced that permitting the courts of each State to enforce" their own "standards of disclosure . . . would unavoidably result in serious interference with the 'accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 45 (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). The Court rejected the argument that it was possible to comply with both state law and the SEC regulations; it noted that "stricter standards of . . . disclosure which may be required under State [law] . . . inevitably will supplant the disclosure rules of the SEC."

The NYAG's suit here presents the same risk of conflicting with the federal objective of uniform national regulations in a number of respects:

First, the NYAG complains that Barclays' disclosures "about its order routing practices were" inadequate because Barclays "claimed that it routed client orders in a manner that was not biased" when, in fact, many orders were routed to LX. (Compl. ¶¶ 68-82.) That is the same kind of order routing disclosure that was at issue in *Guice*—and the SEC has regulations designed to address this very issue. Under the SEC's Rule 606, broker-dealers such as Barclays must make publicly available: (i) a list of the top ten venues to which Barclays routes non-directed orders and (ii) the percentage of orders directed to each of those venues. 17 C.F.R. § 242.606(a)(1)(ii). Brokers also must provide, upon customer request, a list of the venues where each of that customer's orders was routed over the last six months. 17 C.F.R. § 242.606(b). Because the internalization rate is already disclosed under SEC rules, the NYAG Complaint essentially aims to create duplicative and conflicting regulatory obligations under state law that are at odds with the uniform, national approach adopted by the SEC.

Second, the NYAG complains that Barclays reduced fees for HFTs and did not prohibit any of them from using LX. (Compl. ¶¶ 83-88.) But the SEC has promulgated specific regulations on access and disclosure of fees for national securities exchanges and decided to impose more limited "fair access" and fee disclosure requirements on ATSs.[12] Through this litigation, the NYAG is effectively seeking to undo these federal policies and impose disclosure requirements on ATSs that differ from those adopted by the SEC.

Third, the SEC's regulations concerning ATSs are motivated by the same desire for nationwide uniformity that was involved in *Guice.* As the SEC has explained: "The Commission believes the [ATS rules] advance national market system goals."[13] The SEC has also made clear that the principal federal policy towards ATSs is to "nurture[]" alternative trading markets[14] and foster "competition and thus investor choice"[15] by "enabl[ing] smaller

[12] *See* Concept Release on Equity Market Structure, 75 Fed. Reg. at 3599 ("Unlike a registered exchange, an ATS is not required to file proposed rule changes with the Commission or otherwise publicly disclose its trading services and fees."); *id.* at 3602 ("If an ATS neither displays orders to more than one person in the ATS nor exceeds a 5% trading volume threshold, Regulation ATS does not impose access requirements on the ATS."); *see also* 17 C.F.R. § 242.301 (imposing fair access requirements only when ATSs reach a certain market volume threshold).

[13] *See* Reg ATS, 63 Fed. Reg. at 70,859.

[14] SEC Release No. 34-59039, 73 Fed. Reg. 74770, 74776 n.206 (Dec. 9, 2008).

[alternative] markets to compete."[16] To that end, the SEC has carefully calibrated its regulations of trading venues to include appropriate protections for investors while "allow[ing] new markets to start, without disproportionate burdens."[17]

If each of the 50 states were permitted to impose its own standards on ATSs, it would contravene Congress's goal of national uniformity and calibration of regulatory requirements. As the Court of Appeals recognized, "State enforcement of . . . standards of disclosure cannot help but upset the policy-based delicate balance Congress directed the SEC to achieve in the regulatory regime envisaged under the 1975 amendments to the Securities Exchange Act." *Guice*, 89 N.Y.2d at 49.[18] Implied conflict preemption is found where, as here, "state law undermines the intended purpose and 'natural effect'" or "blunt[s] the consequences" of the federal statute. *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 373, 376 (2000) (quoting *Savage* v. *Jones*, 225 U.S. 501, 533 (1912)). Thus, this Court should avoid the risk of a

(*footnote continued*)
15 Reg. Sys. Compliance and Integrity, 78 Fed. Reg. 18083, 18088 (proposed March 25, 2013) (to be codified in scattered sections of 17 C.F.R.).

16 SEC Release No. 34-59039, 73 Fed. Reg. at 74,789.

17 Reg ATS, 63 Fed. Reg. at 70,847.

18 Courts in other states addressing similar state law claims against brokers have consistently reached the same result the Court of Appeals reached in *Guice*. *See*, *e.g.*, *McKey* v. *Charles Schwab & Co.*, 67 Cal. App. 4th 731, 742 (1998) ("[T]he 1975 Amendments to the Securities Exchange Act were intended to promote a national market system and to give the SEC the power to administer and regulate that system."); *Shulick* v. *PaineWebber*, *Inc.*, 700 A.2d 534, 538 (Pa. Super. Ct. 1997) ("The additional regulations that appellant seeks to impose on a broker-dealer under Pennsylvania common law disturb and disrupt the federal regulatory scheme and thus run counter to the objectives of Congress . . . ."); *Orman* v. *Charles Schwab & Co.*, 179 Ill. 2d 282, 297 (1997) ("[A]llowing plaintiffs' related state claims to advance would obstruct the National Market System that Congress intended to foster in enacting the 1975 Amendments.").

conflict between federal and state law by construing the Martin Act according to its plain text, which covers only "securities."[19]

II. BARCLAYS ACCURATELY DISCLOSED ELPS' ROLE IN LX.

When judged within the "total mix" of information in the documents cited in the Complaint, the NYAG's allegations fail to allege any material misstatements. *Rachmani Corp.*, 71 N.Y.2d at 726 (quoting *TSC Indus. Inc.*, 426 U.S. at 449).

A. The Documents Negate the NYAG's Claim that Barclays Misrepresented ELPs' Involvement in LX.

Viewed in their proper context, the very marketing documents that the NYAG alleges are false show that Barclays provided accurate and complete information about LX to its clients. Several of the alleged misstatements arise out of a two-page marketing flyer titled "LX® Liquidity Profiling" and subtitled "Protecting clients in the dark." (Ex. 2 (June 2013 LP Marketing Flyer).) The NYAG did not attach the marketing flyer to its Complaint, but Barclays has included the full flyer as Exhibit 2 because, read in its entirety, the flyer—which expressly states that it was "directed at persons who are professionals and [was] not intended for retail customer use"—refutes the NYAG's allegations completely. The flyer states that 35% of LX traders were ELPs (the category that includes HFTs), and that 9% of LX trading volume was "aggressive," as shown below:

[19] The anti-preemption language in 15 U.S.C. § 77r(c)(1)(A) does not apply here, because, as shown above (*supra* pp. 13-16), this case does not allege fraud "in connection with" a securities transaction. Moreover, ATSs are governed by the Exchange Act, which does not carve out anti-fraud suits against exchanges or ATSs like the Securities Act of 1933 does. *Cf.* 15 U.S.C. § 78o(i) (expressly preempting state law).

Exhibit 2: Excerpt of the Marketing Flyer

The advantage of profiling

Traditionally, dark pools have employed static classification of participants by client type. The Barclays ATS team is able to monitor the quality of flow in the pool on an ongoing basis by using a set of quantitative metrics to grade and classify each participant.

Not all flow is created equal

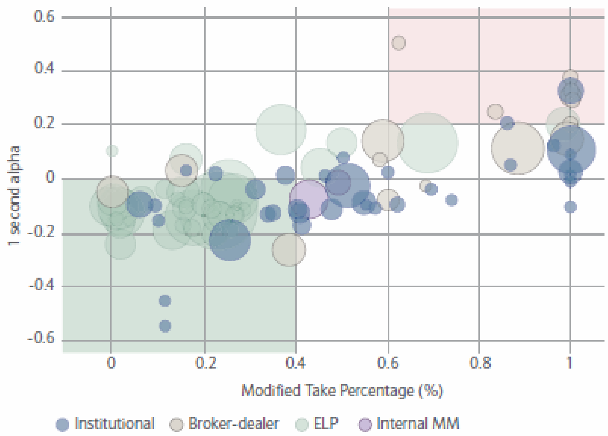
Our research shows that based on objective measures of opportunistic behavior, such as the market impact and the ratio of taking versus providing liquidity, individual clients within the same traditional category do not behave the same. In fact, they behave very differently across a spectrum (see Figure 1).

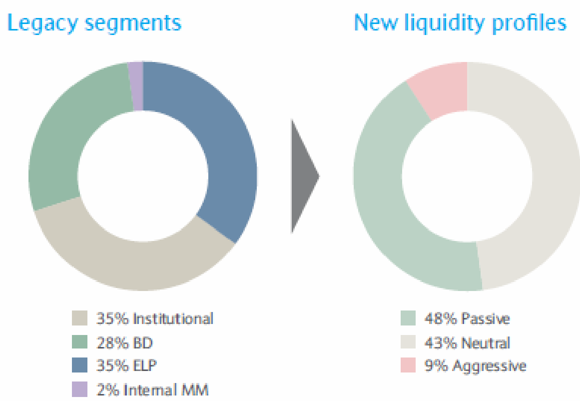
Powerful tools to protect clients

Liquidity Profiling utilizes robust visualization tools (see Figure 2) that synthesize and graph large amounts of data and allow the Barclays ATS team to continuously police the trading activity in LX. The team can quickly identify aggressive behavior and take corrective action with clients who exhibit opportunistic behavior in the pool.

Figure 1: Sample liquidity landscape by category

Participants in the same category do not trade in the same manner. With LX Profiling, the Barclays ATS team can quickly identify aggressive flow from an individual client.





1. There Was Nothing False or Misleading About Barclays' "Sample Liquidity Landscape Chart."

The flyer's illustration was entirely accurate. The upper-right corner of the flyer contained an undated chart, titled Sample Liquidity Landscape by Category. The purpose of this chart, as its caption indicates, was to illustrate that "participants in the same category [*e.g.*, institutional investors, broker-dealers, ELPs] do not trade in the same manner." The Sample Liquidity Landscape Chart is an illustration of Barclays' ability to analyze traders' behavior. Bubbles on the chart are color-coded by category and show that clients of all categories may send passive order flow (in the green region), and likewise clients from all categories may send aggressive order flow (in the red region).

Overlooking the explicitly stated purpose of the sample chart, the Complaint alleges that it constituted an *"analysis purporting to represent the 'liquidity landscape' of Barclays' dark pool*." (Compl. ¶ 35 (emphasis added).) This is plainly wrong. Nothing in the text suggests that this Sample Liquidity Landscape Chart shows the full set of LX participants as of any particular date, or that it "purport[s] to represent the 'liquidity landscape' of Barclays' dark pool." Likewise, it does not say that it is an illustration of actual activity over any particular time frame (*e.g.*, a five-month period between certain dates, or a five-second period on a certain date, etc.). It is, as the heading describes it, a *sample*:

Figure 1: *Sample* liquidity landscape by category.

(Ex. 2 (emphasis added).) In fact, versions of the chart prepared in June 2013 and April 2014 used the exact same graphic. (*Compare* Ex. 2 (June 2013 version), *with* Ex. 9 (April 2014 version).) The fact that the chart was not updated or otherwise changed over the span of ten months underscores that the chart was illustrative—not a comprehensive disclosure of the composition of LX.

The NYAG alleges that the chart is inaccurate because it did not represent all of the participants on LX. (Compl. ¶ 39.) Barclays employees, in revising an earlier (and thus, stale) version of the chart, allegedly chose not to include a bubble that would have shown the position of an ELP called Tradebot. (Compl. ¶ 40.) But as even the selective quotations from emails in the Complaint make clear, deciding against including a bubble showing Tradebot's order flow was entirely appropriate because "the point of the chart . . . is to market [Barclays'] capability . . . to *monitor* individual participants in the pool," not "to show what's in the pool." (Compl. ¶ 42 (alteration in original) (emphasis added).)

There is no suggestion on the chart that it was intended to be a comprehensive depiction of the order flow in LX. Indeed, the title of the chart prominently states that it is merely a "Sample," which means "serving as an illustration or example." Webster's Third New International Dictionary of the English Language, Unabridged 2008 (definition of "sample"). Moreover, as discussed above, the chart was undated (and was not updated for lengthy periods), refuting any suggestion that an investor would understand it to be a current and comprehensive depiction of the order flow in LX. And after Tradebot was not included, there is no allegation that Barclays employees ever suggested to a client that the chart depicted all traders on LX.

Unsurprisingly, then, the NYAG's Complaint does not identify a single client who was misled by the chart or who understood the chart to be an up-to-date, accurate portrayal of LX's participants. *See Hunt* v. *Alliance N. Am. Gov't Income Trust*, *Inc.*, 159 F.3d 723, 730 (2d Cir. 1998) (holding that "[n]o reasonable investor could have viewed [a chart depicting a mutual fund's expected returns] as an exhaustive description of the Fund's risks" (emphasis omitted)).[20] And there is likewise no allegation that the lack of a bubble representing the order flow of a single participant months beforehand would have been material to the highly

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[20] The NYAG's related claim that the chart was reproduced in a marketing deck with "a notation to the chart explaining that it portrays the top 100 clients" in LX (Compl. ¶ 38) is rebutted by the deck itself. (Ex. 6, at 9 (December 2011 Marketing Deck).) Underneath the Sample Liquidity Landscape chart in the deck was another chart showing the composition of the LX pool by legacy segment or liquidity profile. The note that "This chart"—singular—"represents the top 100 clients in LX" was appended to the bottom chart and referred only to that chart. There is no allegation that the bottom chart did not, in fact, refer to the top 100 clients, as it said. The NYAG also does not allege, as N.Y. C.P.L.R. 3016(b) requires, whether or when the deck with the footnoted chart was presented to any client or that any client was misled.

sophisticated professionals that comprise LX clients. (*See* Ex. 2 (June 2013 LP Marketing Flyer "directed at . . . professionals" and "not intended for retail customer use").)

2. The Complaint Improperly Compares Two Different Calculations of Aggressiveness to Wrongly Conclude That One Is False.

The chart also accurately disclosed Barclays' opinions about how much of the trading activity in LX should be considered "aggressive." Immediately underneath the Sample Liquidity Landscape Chart, as shown above, is a second undated chart with "Legacy segments" on the left and "New liquidity profiles" on the right. Although the Complaint presents these charts as completely unrelated statements, they are, in fact, on the same page of the same flyer. (*Compare* Compl. ¶ 35, *with* Compl. ¶ 48.) An early 2013 version of this chart indicates that the "New liquidity profiles" are 48% passive, 43% neutral, and 9% aggressive. (Compl. ¶ 48.) A subsequent version in March 2014 showed that the "Liquidity profiles" at that time were 36% passive, 58% neutral, and 6% aggressive. (Compl. ¶ 48.)

The NYAG alleges that Barclays' statement that the trading activity in LX was 6% aggressive was false, because Barclays "categorized approximately 25% percent [*sic*] of the orders taking liquidity in its dark pool as aggressive" during discussions with an unnamed "prominent high frequency trading firm." (Compl. ¶¶ 48-50.) These allegations, however, draw a comparison between two entirely different calculations. In its marketing materials, Barclays discloses that 6% of *all* "trading activity in LX" is "aggressive." (Compl. ¶ 48; Ex. 9 (April 2014 LP Marketing Flyer.) The 6% number is calculated as a percentage of all orders, *i.e.*, orders taking liquidity *and* orders providing liquidity. (Compl. ¶ 48.) In contrast, the 25% "aggressive" figure is, as acknowledged in the Complaint, calculated as a percentage of "orders *taking liquidity* in [the] dark pool." (Compl. ¶ 50 (emphasis added).) There is no other allegation in the Complaint that these two numbers are inaccurate, apart from the fact that they were based on different metrics.

The NYAG further alleges that this same ELP firm separately "concluded that the trading activity in Barclays' dark pool was '50% good, 50% aggressive.'" (Compl. ¶ 50.) The Complaint does not specify whether this firm came to this conclusion in March 2014, the time Barclays allegedly described 25% of the activity in LX as aggressive, or at some other time when the composition of the pool may have been different. Moreover, the NYAG's claim is inapposite for several reasons: (i) this ELP firm's conclusion cannot be attributable to Barclays as its own representation; (ii) the Complaint does not allege that Barclays' figure was inaccurate based on the metrics Barclays used; and (iii) this ELP firm's definition of "good" versus "aggressive" is not set out in the Complaint and may be entirely unrelated to any of Barclays' representations. *See DH Cattle Holdings Co.* v. *Smith*, 195 A.D.2d 202, 208 (1st Dep't 1994) ("mere opinion" is not an "actionable statement[] of fact").

B. Barclays Was Fully Transparent About How LX Could Protect Clients from Aggressive ELPs.

The Complaint alleges that Barclays, through the following quotes in news articles and Barclays' online publications, misrepresented the extent to which Liquidity Profiling protected LX institutional clients from aggressive ELPs (Compl. ¶ 52):

- "Liquidity Profiling analyzes each interaction in the dark pool, allowing us to monitor the behavior of individual participants" (Compl. ¶¶ 28, 51; Ex. 12 (February 20, 2014 online news story in Markets Media quoting a Barclays employee));
- Liquidity Profiling "police[s] trading behavior" (Compl. ¶ 51; Ex. 11 (a reporter's characterization of Liquidity Profiling in the Institutional Investor Article));
- "As we are able to restrict HFTs interacting with our clients we're getting the better half of their order flow" (Compl. ¶¶ 29, 51, 83; Ex. 1 (HedgeWeek Article quoting a Barclays employee));

- "By identifying aggressive behavior, we can take corrective action with clients who exhibit opportunistic behavior in the pool" (Compl. ¶¶ 28, 57; Ex. 13 (March 14, 2013 online news story in Markets Media quoting a Barclays employee)); and
- Liquidity Profiling helps to "protect [customers] from predatory trading in Barclays LX" and Barclays "quickly responds with corrective action when adverse behavior is detected" (Compl. ¶¶ 27, 51; Ex. 14 (Archived Barclays Website Screenshot)).

The NYAG contends that these statements are false because (i) Barclays allegedly "has never prohibited a single firm from" LX (Compl. ¶54); (ii) Barclays allegedly does not "regularly" update Liquidity Profiling ratings (Compl. ¶ 58); (iii) some LX traders that "should have been categorized as" aggressive "based on objective profiling criteria" were instead rated neutral or passive (Compl. ¶¶ 60-63, 67); (iv) Barclays does not apply Liquidity Profiling to orders processed through a Barclays algorithm, and traders cannot choose who they take liquidity from (Compl. ¶ 64); and (v) the placement of bubbles in the Liquidity Landscape chart did not necessarily correspond to traders' rating in the Liquidity Profiling service (Compl. ¶ 65).

These allegations suffer from many substantive defects—not the least of which is the independently fatal problem that they are an attempt to manufacture a fraud claim by ripping short quotes out of context and stringing together language from different articles and documents, written at different times, by different authors. *See Schwartz* v. *Novo Industri*, *A/S*, 658 F. Supp. 795, 799 (S.D.N.Y. 1987) ("[P]laintiff fails to demonstrate how . . . it would be fair to draw an inference of fraud from a statement appearing in a news article over which defendant had less than complete control."). Indeed, one of these quotes is not even from a Barclays employee, but simply a third party's characterization of Liquidity Profiling. (*See* Compl. ¶ 51 (alleging that Barclays represented that Liquidity Profiling would "police trading behavior" (quoting reporter's assertion from Ex. 11 (Institutional Investor Article)).) But even if the Court considered such quotes as the basis of a fraud claim, the NYAG has failed to allege that such quotes are materially false or misleading.

1. Barclays Never Promised That It Would Bar Aggressive Traders from LX.

The Complaint alleges that "Barclays does not actually police or punish bad trading behavior" because Barclays did not prohibit any firm from participating in LX. (Compl. ¶¶ 52, 54.) This allegation wrongly presumes that policing of the pool requires expelling traders from the pool. In fact, to "police" means "to supervise the operation, execution, or administration of" something. *See* Webster's Third New International Dictionary of the English Language, Unabridged 2008 (definition of "police").

In line with its representations, Barclays segmented traders based on trader-specific metrics and then grouped those traders into six categories. (*See supra* pp. 9-10.) Investors who were willing to interact with any other trader (including "aggressive" traders) could do so, and those who only wanted to interact with non-"aggressive" flow could do so as well, thereby prohibiting "aggressive" traders from accessing their trading flow. (*See supra* p. 10.) There is no allegation that Barclays stated that it had "prohibited" anyone from trading on LX, and the fact that Barclays did not entirely expel a firm from trading in its pool does not render statements that it would police the pool false.

2. Barclays Performed Liquidity Profiling Reviews in Proper Intervals.

The NYAG alleges that Barclays' statements that Liquidity Profiling reviews would protect institutional clients were false, because such reviews were "sporadic" and did not occur "for months." (Compl. ¶¶ 58-59.) But there is no allegation that Barclays told clients it was performing the periodic reviews any more or less frequently than it actually did. This is fatal to the NYAG's claim.[21] Indeed, the very documents on which the NYAG relies show that Barclays conducted ongoing monitoring beyond just periodic reviews.

Before Liquidity Profiling, clients were segmented "during onboarding" based on their type (institutional, broker-dealer, ELP). (Ex. 6, at 8.) Liquidity Profiling introduced periodic reviews, but there is no allegation that clients' trading behavior changed so frequently that it was necessary to conduct such reviews any more frequently than Barclays did. Nor is there any allegation that clients expected Barclays to conduct the reviews more frequently than it did.

Moreover, the same marketing flyer explains Barclays' monitoring not only in terms of periodic reviews of client activity, but in terms of the "robust visualization tools" available to Barclays employees "that synthesize and graph large amounts of data and allow the Barclays ATS team to continuously police the trading activity in LX." (Ex. 2; *cf.* Ex. 5, at 21 (Execution Sales Education Series Class Notes Booklet Excerpt describing interface for "[r]eal-time" monitoring); Ex. 6, at 8 (December 2011 Marketing Deck) (separately listing "client[] profiles" and the "proactive[] monitor[ing]" component of Liquidity Profiling).) Barclays, in fact, had such tools and reviewed them—and there is no allegation to the contrary.

[21] The only alleged misstatement in the Complaint that even seems to relate to this point is a portion of a marketing flyer that described Liquidity Profiling as designed to "monitor[] the behavior of individual participants and quickly *respond*[] with corrective action *when adverse flow is detected*." (Ex. 2 (June 2013 LP Marketing Flyer) (emphasis added).) This merely says that Barclays will respond quickly *when* adverse flow is "detected"; it says nothing about updating the ratings of traders in LX, much less suggest that Barclays will update those ratings on any particular schedule.

3. Barclays Disclosed that It Would Use Factors Beyond the Objective Criteria in Assigning Ratings.

The NYAG alleges that profiles for some Barclays trading desks that "should have been categorized as" aggressive "based on objective profiling criteria" were instead rated neutral or passive. (Compl. ¶¶ 60-63, 67.) The basic premise of this argument is erroneous: Barclays did not represent that it was categorizing traders based solely on certain stated "objective profiling criteria." It said the opposite: the marketing materials explicitly told clients that "Analysis of Liquidity Profiling factors is ongoing" and Liquidity Profiling would consider factors other than those mentioned, "for example, . . . parent-level metrics." (*E.g.*, Ex. 4, at 5 (July 2013 Marketing Deck).) A summary that Barclays made available to clients also stated: "Barclays reserves the right as operators of LX to override the profile of any participant." (Ex. 15, attachment 5 (20-day summary provided to a client, referenced in Compl. ¶ 75).)

There is also nothing misleading in the fact that Barclays rated its own desks as "passive" traders. The NYAG's only attack on this rating is a conclusory statement—with no citation—that Barclays rated one of its desks as passive even though that desk allegedly "engaged in high-speed, high-order volume trading akin to high frequency trading" and so, based on unidentified "objective profiling criteria," should have been rated aggressive. (Compl. ¶ 61.) Even if this unsourced allegation were sufficient to survive a motion to dismiss (and it is not), Barclays clearly explained to its clients that the goal of Liquidity Profiling was to move beyond simple segmentation of traders who engage in high frequency trading and those who do not, because not all clients of a particular type (ELPs, broker-dealers, or institutional investors) "trade in the same manner"—as the marketing flyer said explicitly—and different clients have different appetites for trading with different types of order flow. (Ex. 2 (June 2013 LP Marketing Flyer).) Accordingly, the fact that one of the Barclays desks engaged in "trading *akin* to high frequency trading" (and it is entirely unclear what that allegation means) in no way shows that the flow was not "passive."

4. Barclays' Liquidity Profiling of Various Types of Order Flow Was Completely Proper.

The NYAG alleges that Liquidity Profiling does not protect clients from interacting with "aggressive" flow in two circumstances:

1. **Barclays Client Orders Placed by a Barclays Algorithm**: Barclays' clients have the option of placing orders using a Barclays algorithm. The Complaint alleges that orders "routed to the dark pool via Barclays' proprietary algorithms are not included in the Liquidity Profiling service." (Compl. ¶ 64.)

2. **Providing Flow**: The Complaint alleges that clients cannot use Liquidity Profiling to block counterparties when taking liquidity.

(Compl. ¶ 64.) But the NYAG identifies no statement by Barclays that these kinds of orders *would* be covered by Liquidity Profiling.

As the NYAG concedes, "aggressive" strategies are implemented using *direct* connections to exchanges and ATSs, as aggressive traders seek a "speed and technology advantage[]" over other traders. (Compl. ¶¶ 13-14.) Such strategies are not implemented using Barclays' algorithms. Indeed, the Complaint does not allege that any "aggressive" order flow was routed through Barclays' algorithms, meaning that the exclusion of Barclays' algorithms from profiling would not have prevented a client from blocking the type of flow that it intended to block based on its Liquidity Profiling numerical designation.[22]

Likewise, Barclays did not allow clients to choose from whom they "take" liquidity, because "takers" are considered the "aggressive" party in a trade. (Compl. ¶ 64.) By

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[22] To the extent that the NYAG claims that Barclays' algorithms did not account for Liquidity Profiling designations when making trading decisions, the NYAG does not—and cannot—cite to any Barclays' statement that its algorithms and router used Liquidity Profiling counterparty blocks on orders directed to LX.

contrast, Barclays allows LX clients to choose to whom they "provide" liquidity, because such a transaction exposes the LX client to the possibility of aggressive trading. Indeed, Barclays clearly disclosed to clients that Liquidity Profiling was based on measurements of a trader's activity when *taking* liquidity. (Ex. 7, at 3 (March 2013 Marketing Deck) (describing "1-Second *Take* Alpha" (emphasis added)).) There is no allegation that any of Barclays' clients were misled on this point.

5. Barclays' Marketing Flyer Used Proper Metrics to Categorize Traders Within LX.

Finally, the NYAG alleges that the marketing flyer titled "Liquidity Profiling — Protecting You [*sic*][23] in the Dark" was misleading. The Sample Liquidity Landscape Chart contained green, white, and red shaded areas, which the NYAG interprets as meant to depict passive, neutral, and aggressive traders. The NYAG contends that the green and red shaded areas were "misleading because traders . . . in the 'passive' field of the chart were not necessarily rated . . . passive" (and vice versa for the "aggressive" field). (Compl. ¶ 65.)

Again, however, the Complaint fails to allege that a single client would have found this flyer confusing in context. For example, there are also six possible ratings (Compl. ¶ 26), but only three shaded regions on the chart (green, white, and red) (Ex. 2 (June 2013 LP Marketing Flyer)). Thus, it would be impossible to describe every trader's rating using this color scheme, as the NYAG alleges.

For the same reasons, no client would have interpreted this chart as showing conclusively what each trader's rating was. Nothing in the chart or its surrounding context states that the chart depicts the factors used to segment customer flow. To the contrary, the text

[23] The title of the flyer is misquoted in the Complaint. The correct title is "LX® Liquidity Profiling — Protecting clients in the dark." (Ex. 2.)

surrounding the chart explained that it merely illustrated that "[p]articipants in the same category do not trade in the same manner." (*Id.*) And given that many of the bubbles on the chart are not located entirely in the green or red shaded areas, there is no indication of how these bubbles on the edge of each region would be categorized, making clear that the chart was not meant to show what each trader's rating was. Finally, significant factors that were used in assigning ratings to clients for Liquidity Profiling were disclosed in materials other than the two-page marketing flyer, so clients who were interested in the factors considered could learn them from other materials they received. (Ex. 6, at 10 (December 2011 Marketing Deck); Ex. 8, at 11 (December 2012 Marketing Deck); Ex. 7, at 3 (March 2014 Marketing Deck).)[24]

C. Barclays' Relationships With ELPs Trading on LX Was Completely Proper.

The Complaint alleges that Barclays encouraged HFTs to use LX by offering them favorable commission rates and connections to the pool. (Compl. ¶¶ 84, 87.) But the Complaint identifies no misrepresentations regarding these issues (much less identify such misrepresentations with particularity).

In fact, the suggestion that Barclays somehow represented that it would not encourage ELPs to use LX is contradicted by the documents on which the NYAG relies. A stated goal of Liquidity Profiling was to "get[] the better half of [ELPs'] order flow (*i.e.*, higher quality liquidity)," without the "aggressive" HFT flow. (Ex. 1, at 2 (HedgeWeek Article quoting a Barclays employee).) To effectuate this goal, Barclays obviously would need to seek ELP participation in LX. Moreover, Barclays explicitly told clients that ELPs were a major

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[24] For example, one version of the chart described the factors evaluated by the Liquidity Profiling reviews and explicitly stated that "aggressive" or "passive" ratings are based on short-term alpha and order size, not "Modified Take %." (Ex. 8, at 10.)

component of the pool: Barclays' marketing materials disclosed that 35% of the trading in LX consisted of ELPs. (Ex. 2 (June 2013 LP Marketing Flyer).)

The NYAG alleges that Barclays allowed ELPs to cross-connect their computerized trading systems directly to the computer systems that run LX (potentially giving HFTs a speed advantage in LX). (Compl. ¶ 87.) But the NYAG fails to allege—because it cannot—that Barclays does not also allow institutional clients the same functionality. (Compl. ¶ 87.) The fact that many clients cross-connect with trading venues has been the subject of extensive publicity and is well-known in the industry. And given that Barclays' clients knew ELPs were in LX, clients understood that ELPs were cross-connected.

The NYAG also alleges that it was possible for HFTs to engage in "latency arbitrage" (trading ahead of other clients) using LX. (Compl. ¶¶ 14, 87.) Barclays allegedly stated "that it used ultra-fast 'direct data feeds' to process market price and trade data in order to *deter* latency arbitrage." (Compl. ¶ 87 (emphasis added).) In other words, Barclays said that it would try to process market data updates quickly, in order to make it difficult for "aggressive" ELPs to obtain a speed advantage in LX. There is no allegation that Barclays did not use direct data feeds in an effort to deter latency arbitrage, and the purported fact that some ELPs may have been able to engage in a certain level of latency arbitrage on LX does not render Barclays' statements false in any way.

Finally, the allegations that Barclays imposed low commissions on ELPs is irrelevant, as, once again, it is not paired with any allegation that Barclays said anything to the contrary. (Compl. ¶ 87.) In fact, whereas many institutional investors receive a variety of brokerage services, ELPs engage in high-volume trading and have relatively limited servicing needs. (Compl. ¶¶ 12, 61.) Thus, it is unsurprising that ELPs would be charged lower commission rates.

D. Barclays Did Not Improperly Share "Sensitive" Information with Certain ELPs.

Citing Barclays' responses to just two ELP questionnaires—and not to any systematic communications—the NYAG alleges that, "[o]n numerous occasions," Barclays favored its major ELP clients by sharing with them "sensitive" information "not generally supplied to other clients." (Compl. ¶¶ 85-86.) The NYAG claims that these questionnaire responses were contrary to Barclays' representations that LX offered protection from aggressive ELPs. (Compl. ¶ 83.) This contention lacks any logic or support. None of the supposedly "sensitive" information contained in the responses—LX's order router's logic, and a breakdown of trades executed by participant type and "toxicity" level (Compl. ¶ 85)—had anything to do with any client's proprietary or confidential positions. Moreover, the NYAG does not—because he cannot—allege anything to support the allegation that Barclays does not routinely share this very same information with any LX client that asks for it, nor is there any allegation that Barclays told any clients that it would not answer questions concerning such information. Accordingly, the NYAG lacks any basis for his allegations of fraud.

III. BARCLAYS' ROUTING OF CLIENT ORDERS WAS FULLY CONSISTENT WITH ITS STATEMENTS ABOUT ORDER ROUTING.

The NYAG alleges that, despite Barclays' representation that it would route its clients' orders to trading platforms based on execution quality and likelihood of fill, Barclays actually routed a high percentage of all dark pool orders first to LX. (Compl. ¶ 74; *see also* Compl. ¶¶ 68-82.) The NYAG references statements made in a pitchbook (Compl. ¶ 69; *see* Ex. 8, at 12, 13 ("Maximizes fill rates"; "Treat all venues the same based on execution quality"); in internal talking points (Compl. ¶ 70; *see* Ex. 3 ("Our router takes into account multiple factors" including "real time market data, real time venue fill rates, and historical venue market share")); and in an email to clients (Compl. ¶ 71; *see* Ex. 16 ("[o]rder routing decisions are primarily based on the probability of fill")) as purported misrepresentations. But the NYAG's allegation that these statements were false is based on mischaracterized documents presented to individual clients, statements from anonymous former employees and a misunderstanding of the distinction between routing and executions.

The NYAG principally relies on a single presentation to a single client allegedly reflecting that "Barclays had an extremely high 'internalization rate'—that is, a high rate of routing client orders into Barclays' own dark pool," which allegedly "suggest[s] that Barclays' representations to investors that it did not route orders in favor of any particular trading venue were false or misleading." (Compl. ¶¶ 77, 79.) The Complaint incorrectly describes the internalization rate in terms of orders *routed*, whereas the internalization rate in the presentation is actually the percentage of orders *executed* in LX versus other venues. (*See* Ex. 17, at 10.) Thus, the Complaint is describing an entirely different metric than the one used in the presentation to the client. Executions weighted toward one venue do not necessarily mean routing bias toward that venue. For example, an order could route to several different dark and lit venues but eventually execute in the venue that has liquidity, which may be (and often is) LX. Also, in drawing conclusions about Barclays' overall routing practices, the NYAG ignores that the presentation considered only a subset of Barclays' order flow eligible to execute in dark pools, and therefore is not reflective of all Barclays' order flow, which routes to both dark and lit venues.

Although the NYAG relies upon a single client presentation to suggest that Barclays' representations in marketing materials were false, the NYAG does not allege that this client was misled as to its routing operations. Indeed, clients using Barclays' algorithms receive information regarding where their orders are executing, as well as reports regarding routing and execution of their orders upon request.

As for the NYAG's allegation that "Barclays told another [HFT] that approximately 90% of all orders 'are first directed into the dark pool,'" that purported statement is plainly misquoted. (Compl. ¶ 75.) The quoted text comes from a questionnaire in which a client asked Barclays, "What % of all internal firm flows are first directed into the dark pool (assumes some % bypasses the dark pool and goes outbound to other venues)," and Barclays responded to the parenthetical in the question by stating "10-15% of flow will by-pass LX." (Ex. 15.) Aside from attributing a client's words to Barclays, the NYAG ignores that Barclays was actually stating that 85–90% of flows are *eligible* to trade in LX, not that this percentage would be first directed to LX.

Finally, there is no allegation that Barclays did not provide its clients with quality executions when executing in LX as opposed to other venues. LX was one of the two largest dark pools in the country (Compl. ¶ 31), so it is unsurprising that LX often had liquidity. Moreover, Barclays' router had data about the liquidity available in LX, so Barclays could route orders to LX with confidence that there was liquidity available to fill them, whereas it would risk unfilled orders (and information leakage, *see supra* n.3) if it routed to a third-party dark venue when liquidity was available in LX.[25] Thus, the NYAG fails to adequately plead that Barclays misrepresented its order routing practices.

[25] The NYAG's general reliance on unattributed allegations with respect to Barclays' routing practices, (*see*, *e.g.*, Compl. ¶ 76), vividly illustrates the wisdom of the rule that courts should "be skeptical of confidential sources cited in securities fraud complaints"—particularly when the complaint fails to "fully describe[] the foundation or basis of the confidential witness's (*footnote continued*)

IV. THE NYAG CANNOT SEEK DAMAGES OR RESTITUTION ON BEHALF OF PRIVATE INVESTORS.

The NYAG has no legal basis for seeking money damages from Barclays. The NYAG never once identifies a single investor in New York who was materially misled, nor does he make even one allegation that any investor was injured. The general rule in New York is that a fraud claim must allege "factual details that would establish specific damages resulting from defendants' alleged misrepresentations." *N. Stamping*, *Inc.* v. *Monomoy Capital Partners*, *L.P.*, 107 A.D.3d 427, 428 (1st Dep't 2013). This rule has been applied to Martin Act suits, and courts have "properly dismissed" Martin Act claims where the plaintiff "fail[s] to allege any injury inuring to them because of defendants' alleged failure to comply with the Martin Act." *Cohen* v. *Brown*, *Harris*, *Stevens*, *Inc.*, 64 N.Y.2d 728, 731 (1984). Because the NYAG does not make any allegations of injury to the People of the State of New York (or anyone else), or of any unfair gains to Barclays, the request for "damages" and "restitution" must be dismissed.[26]

Even if the NYAG had identified any private parties allegedly harmed by Barclays' actions, the NYAG lacks standing to seek monetary relief on their behalf. The NYAG,

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(*footnote continued*)
knowledge, including the position(s) held, the proximity to the offending conduct, and the relevant time frame." *Mizzaro* v. *Home Depot*, *Inc.*, 544 F.3d 1230, 1240 (11th Cir. 2008).

The NYAG attributes these allegations to one or two former employees—one of whom was fired around the time of the incident and one of whom voluntarily resigned months later (Compl. ¶¶ 80-81)—raising the concern that "these confidential sources [may] have axes to grind." *Higginbotham* v. *Baxter Int'l*, *Inc.*, 495 F.3d 753, 757 (7th Cir. 2007). Although the Complaint seems to suggest that one of these witnesses was fired in retaliation for refusing to change a number in a presentation, the employee in question in fact had become subject to a reduction-in-force process well in advance of the alleged presentation. The other employee decided to resign voluntarily months later. The presentation had no relationship to these employees' personnel issues (and the Complaint does not allege otherwise).

[26] Barclays also respectfully reserves, and does not waive, the contention that disgorgement is not available under the Martin Act. *Cf. People ex rel. Cuomo* v. *Ernst & Young LLP*, 114 A.D.3d 569 (1st Dep't 2014).

like any other litigant, "must show an interest in the subject-matter of the litigation to entitle [him] to prosecute a suit and demand relief." *People ex rel. Spitzer* v. *Grasso*, 54 A.D.3d 180, 198 (1st Dep't 2008) (quoting *People* v. *Lowe*, 117 N.Y. 175, 191 (1889)). The NYAG has standing to pursue claims to vindicate sovereign or "quasi-sovereign interest[s]," *id.*, which include "interests which the State has in the well-being of its populace." *State ex rel. Abrams* v. *N.Y.C. Conciliation & Appeals Bd.*, 123 Misc. 2d 47, 49 (Sup. Ct., N.Y. Cnty. 1984). But the interests must consist of something more than "purely private claims of individual citizens." *Id.*

The Attorney General cannot satisfy that requirement here. If the NYAG's allegations are true, Barclays' clients can seek their own monetary remedies. Any argument in favor of NYAG standing is much "less compelling when private suits by the aggrieved parties are feasible and would provide complete relief." *Id.* at 50; *see also People ex rel. Abrams* v. *11 Cornwell Co.*, 695 F.2d 34, 40 (2d Cir. 1982) ("Parens patriae standing . . . requires a finding that individuals could not obtain complete relief through a private suit."), *vacated in part on other grounds*, 718 F.2d 22 (1983) (en banc). The NYAG cannot seek damages or restitution on behalf of private parties unless the NYAG can "prove a quasi-sovereign interest distinct from that of a particular party and injury to a substantial segment of the state's population." *People ex rel. Spitzer* v. *Grasso*, 11 N.Y.3d 64, 69 n.4 (2008) (citing *Alfred L. Snapp & Son*, *Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982)). In this case, the NYAG does not allege injury to even a single New York resident—let alone "a substantial segment of the state's population." Accordingly, the NYAG's requests for monetary damages must be dismissed.[27]

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[27] The mere fact that the Martin Act purports to allow the NYAG to seek "restitution" on behalf of investors does not fix the NYAG's standing problem. "The Legislature, consistent with the principles of separation of powers underlying the requirement of standing, cannot grant the right to sue to a plaintiff who does not have standing." *Grasso*, 54 A.D.3d at 197 (internal (*footnote continued*)

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed with prejudice.[28]

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New York, New York

Respectfully submitted,

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(footnote continued)
citations omitted); *see also Hearst Corp.* v. *Clyne*, 50 N.Y.2d 707, 713-14 (1980) (confirming constitutional stature of separation-of-powers doctrine under New York law). Thus, that the statute purports to create a restitution remedy does not confer standing on the NYAG. To the extent that it attempts to give the NYAG standing to seek monetary relief on behalf of private investors, that provision is simply unconstitutional.

28 The NYAG's Executive Law claim—which is predicated on the Martin Act Claim (*see* Compl. ¶ 92)—fails for the same reasons that the Martin Act claim fails. Executive Law § 63(12) "includes 'virtually identical language' to the Martin Act," *People ex rel. Cuomo* v. *Greenberg*, 95 A.D.3d 474, 482-83 (1st Dep't 2012), *aff'd*, 21 N.Y.3d 439 (2013); *see also Rachmani Corp.*, 71 N.Y.2d at 721 n.1 (1988). Moreover, courts have recognized that "Executive Law § 63(12) . . . does not create independent claims, but merely authorizes the Attorney General to seek injunctive and other relief on notice prescribed by the statute in cases involving persistent fraud or illegality." *Charles Schwab & Co.*, 109 A.D.3d at 449 (affirming dismissal of Executive Law claim due to dismissal of underlying Martin Act claim). The Executive Law claim should therefore be dismissed.

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APPENDIX A

Exhibit No.	**Paragraph(s) Referencing Exhibit**
1	¶¶ 29, 51, 83
2	¶¶ 35, 36, 37, 48, 65
3	¶¶ 30, 70
4	¶¶ 27, 28, 54, 57
5	¶ 18
6	¶ 16
7	¶ 31
8	¶¶ 2, 38, 69, 74
9	¶ 48
10	¶ 26
11	¶ 51
12	¶¶ 2, 28, 31, 32, 51
13	¶¶ 28, 57
14	¶¶ 27, 51
15	¶ 75
16	¶ 71
17	¶¶ 78, 81