To be Argued by:
CHARLES A. MICHAEL
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

In the Matter of the Inquiry of LETITIA JAMES,
Attorney General of the State of New York,

Petitioner-Respondent,

– against –

IFINEX INC., BFXNA INC., BFXWW INC., TETHER HOLDINGS LIMITED, TETHER OPERATIONS LIMITED, TETHER LIMITED and TETHER INTERNATIONAL LIMITED,

Respondents-Appellants.

Appellate Case No.: 2019-03341

REPLY BRIEF FOR RESPONDENTS-APPELLANTS

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INTRODUCTION

This proceeding should have been dismissed. The trial court lacked personal jurisdiction over the Respondents because of improper service and because the dispute does not arise from activity in New York. The trial court also lacked subject matter jurisdiction because the product at issue, tether, falls outside the reach of the Martin Act. The opposition brief from the Office of the New York Attorney General ("OAG") cannot overcome these fundamental deficiencies.

First, OAG concededly failed to comply with the requirements in Gen. Bus. L. § 355 for service of process upon Bitfinex (collectively, iFinex Inc., BFXNA Inc., and BFXWW Inc.) and Tether (collectively, Tether Holdings Limited, Tether Operations Limited, Tether Limited, and Tether International Limited). The statute required delivery of a certified copy directly to Bitfinex and Tether, but OAG sent copies to outside counsel via email and courier. To justify this deviation, OAG invokes what it calls an "exception" under CPLR 311(b).

There are no "exceptions" to the mandatory statutory language of Gen. Bus. L. § 355, however. And service would still be improper even assuming OAG's hypothesized exception existed. CPLR 311(b) allows courts to devise alternate methods of service where the regular ones are impracticable. But CPLR 311(b) must be preceded by a motion asking for relief under it, and explaining why the regular methods cannot be used. OAG *never made such a motion*, instead asking

this Court to conclude after the fact that OAG's hypothetical motion *would have been* justified. New York law rejects this sort of retroactive motion practice.

OAG's fallback is to argue that Bitfinex and Tether waived their right to challenge service by not raising the point in an emergency motion made just days after learning of OAG having ambushed them with the *ex parte* order OAG obtained at the outset of the case (the "§ 354 Order"). Setting aside that Bitfinex and Tether expressly stated in the motion itself that they planned to challenge jurisdiction, any suggestion of waiver is wrong.

OAG concedes, as it must, that a party's initial participation in a special proceeding does not waive service challenges, so long as that challenge is brought in the first motion to dismiss in the proceeding, as was done here. According to OAG's imaginative argument, however, these doctrines can be ignored here because § 354 cases are somehow *not* special proceedings at all, apparently occupying some sort of undefined, procedural netherworld where motions to dismiss do not exist. That assertion is frivolous. The CPLR establishes that all civil proceedings are either "actions" or "special proceedings," *see* CPLR 103(b), and in either case a motion to dismiss may be filed, *see* CPLR 404(b).

Second, personal jurisdiction is lacking because this proceeding does not arise from any activity by Bitfinex or Tether in New York. OAG tries to move the goalposts by arguing that *any* New York conduct counts towards the jurisdictional

inquiry insofar as that activity may be relevant to OAG's undefined and open-ended "investigation." That is the wrong framework. Proceedings under Gen. Bus. L. § 354 are allowed only after OAG has "determined" to bring a claim, and discovery may only reach evidence that "relates" to the claim at issue. It is not a boundless discovery tool, and the jurisdictional analysis should be commensurate with the scope of the statute.

Third, independent of the defects in personal jurisdiction, this proceeding should be dismissed because tethers are not securities or commodities within the reach of the Martin Act. OAG makes *no argument* as to how tethers could qualify, claiming instead that the issue should be deferred until later, if and when it files a civil action. But courts routinely ask whether an agency is acting within its statutory authority *before* enforcing the agency's discovery demands. Doing so is especially appropriate here, given that OAG has already obtained significant, substantive relief in the form of a preliminary injunction.

Fourth, stepping back from the narrow legal points, OAG advances an overarching and misguided theme in its brief that underlies several of its erroneous arguments — namely, that Bitfinex and Tether are seeking an "extraordinary" remedy in the form of "halt[ing] an ongoing investigation." (OAG Br. 1.) References to Bitfinex and Tether "halting," "freezing," "stopping," or "killing" OAG's investigation appear in OAG's brief *ten times*. (*Id*. at 1, 2 (twice) 3 (three

times), 30, 33, 34, 39.) But repeating an assertion over and over again does not make it true. The reality is that this appeal challenges *one particular* instance of OAG using *one particular* tool (Gen. Bus. L. § 354) in OAG's investigative toolbox. No one has suggested that the investigation is somehow prohibited.

All manner of other investigative steps are not at issue in this appeal and remain fully available to OAG. For example, under Gen. Bus. L. § 352, OAG is "empowered to subpoena witnesses," to "examine them under oath," or "require the production of any books or papers" relevant to an investigation. Gen. Bus. L. § 352(2). And under Executive L. 63(12), OAG may "issue subpoenas in accordance with the civil practice law and rules." Executive L. § 63(12).

OAG could attempt to use these tools as against Bitfinex and Tether, or against any third parties. And, of course, OAG may initiate new proceedings under Gen. Bus. L. § 354, against Bitfinex and Tether or against others, and endeavor to properly support the basis for those new proceedings. What OAG may not do, we respectfully submit, is file a procedurally defective § 354 application, that was not properly served and that focuses on a product outside its statutory mandate, as a foothold to gain boundless discovery and an injunction.

Finally, while not strictly relevant to the issues on appeal, Bitfinex and Tether must briefly respond to OAG's highly misleading factual presentation, which reads as if it were addressed to a public company with disclosure obligations

to shareholders, or to a regulated bank. For example, OAG complains that it was not allowed to bless the 2019 loan facility before it closed (*see* OAG Br. 18-19), as if OAG were the Respondents' regulator. It is not. And OAG expresses dismay that Bitfinex and Tether "never disclosed to their clients that they used Crypto Capital" to process transactions (OAG Br. 14), and never disclosed the details of the line-of-credit transaction (though the fact of affiliated loans *was* disclosed). (OAG Br. 18.) But Bitfinex and Tether are *private* companies, and neither OAG nor anyone else has regulatory authority to dictate their reserving policies, or to require disclosure of particular banking relationships or transactions. Customers who choose to buy virtually currencies are obviously well-aware that, in doing so, they are not placing their money in FDIC-backed traditional bank accounts, or investing in public companies that issue quarterly SEC reports.

In any case, even if the Martin Act could apply to tethers (and it does not), the statute would not mandate how Bitfinex and Tether must run their business, or what reserves must be held in what form. The statute reflects a "disclosure approach," whereby those warned of the facts can engage in "self-protection" by deciding for themselves whether to buy or sell. *Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 N.Y.3d 236, 243 (2009). That standard was met here. Bitfinex and Tether disclosed to the public that its reserves could include affiliated loans, and did so well *before* the line-of-credit transaction at issue here closed.

(A189 ¶ 31; A202 (Item 1.1.32).) The disclosure was widely reported in the media. (A224-38.) If that disclosure were not enough, surely at least the vast disclosure of this proceeding (including OAG's reckless press "splash") cured whatever possible shortcoming there could have been in the disclosures.

OAG has not identified a single "victim" of the alleged fraud, because there are none. Holders of tethers and other "stablecoins" are entitled to redeem them for exactly what they paid for them — no more and no less — and Tether has had no issue satisfying redemption requests to anyone, even after OAG's incendiary case. (A745 ¶ 34.) Anyone still holding tethers eight months into this proceeding is doing so with eyes wide open. The line-of-credit transaction has not created a cash crunch; quite the contrary, the loans are being paid back ahead of schedule, with interest. (A745 ¶ 33.)

The Court should not be swayed by OAG's irrelevant smears, and should instead focus on the procedural and legal questions on appeal. As to those issues, the trial court made a series of errors that demand correction, and that require that this proceeding be dismissed.

ARGUMENT

I. This Court Lacks Personal Jurisdiction Because Service Was Improper

Nothing in OAG's opposition brief can alter the fact that its attempted service failed to comply with the statutory requirements. (Resp. Br. 17-32.) As

discussed below, OAG focuses on a so-called "exception" to the statutory requirements that does not exist, and also argues, contrary to settled law, that the Respondents' jurisdictional challenge, expressly preserved in their first, emergency filing with the trial court and raised by motion within 30 days of the case being filed, somehow came too late. These arguments are meritless.

A. OAG Did Not Comply with the Statutory Service Requirements

When OAG argues that "exceptions exist" to the service method stated in Gen. Bus. L. § 355 (*see* OAG Br. 59), OAG is conceding the obvious: that it failed to comply with § 355 as written. The key statutory language in § 355 states that a § 354 order "shall be served upon the person named in the endorsement aforesaid by delivering to and leaving with him a certified copy thereof . . . ." Gen. Bus. L. § 355. Contrary to those requirements, OAG attempted to serve copies on outside counsel via courier and email. (A706-7; A269 ¶ 49; A331; A332.)

B. There Is No CPLR 311(b) "Exception"

The "exception" OAG invokes on appeal is CPLR 311(b), which allows a trial court to direct alternate service methods if the traditional methods are found to be "impracticable" after a "motion without notice" is filed. CPLR 311(b). This argument should be rejected for three independent reasons, detailed below: (i) it is

forfeited; (ii) CPLR 311 does not apply in this context; and (iii) the standards of CPLR 311 were in all events not met here.[1]

1. OAG Forfeited Any Argument That CPLR 311(b) Supports Its Defective Service

As the Respondents explained in their opening brief, OAG made no mention of CPLR 311 in its papers below, thus forfeiting the argument. (Resp. Br. 19 (citing A732-34).) OAG's opposition brief does address this forfeiture point. (OAG Br. 59-63.) The Court should reverse on this basis alone, as OAG's forfeited CPLR 311(b) argument is the lone ground by which OAG defends its plainly improper service. (*Id*.)

2. CPLR 311(b) Does Not Apply in the Context of Gen. Bus. L. § 354 Proceedings

CPLR 311(b) would not apply in any event because Gen. Bus. L. § 355 specifies how orders under § 354 "shall" be served, and does not refer to CPLR 311. The statutory service language in Gen. Bus. L. § 355 would be rendered meaningless if it were interpreted to mean that CPLR 311 governs instead.

[1] OAG's brief argues three times that the service defects here should be disregarded because Bitfinex and Tether had notice and thus were not prejudiced. (OAG Br. 30, 62, 63.) But in none of those instances does OAG address the Court of Appeals' holding (cited in the opening brief (Resp. Br. 21)) that "[i]n a challenge to service of process, the fact that a defendant has received prompt notice of the action is of no moment." *Macchia v. Russo*, 67 N.Y.2d 592, 595 (1986). If actual notice were sufficient, then there would no point in writing statutes specifying how papers are to be served.

OAG selectively quotes *Abrams v. Lurie*, 176 A.D.2d 474, 476 (1st Dep't 1991), for the proposition that a § 354 order may "be served in the same manner as a summons" (for example, under CPLR 311). But that is a gross misrepresentation of *Lurie*. This Court in *Lurie* rejected OAG's mail service of a § 354 order, and referred to summons-like service only when it observed that OAG would lose its case *even if § 355 did not exist*, since mail service does not suffice in the case of a summons. The full passage, omitted from OAG's brief, is as follows:

> The same conclusion would have to be reached *even if General Business Law § 355 did not require that a General Business Law § 354 order be delivered and left with the person named therein*. General Business Law § 357 provides that the provisions of the CPLR shall apply to "all actions" brought under the Martin Act except as otherwise provided. A General Business Law § 354 order is closely analogous to both a subpoena and a temporary restraining order, both of which, under the CPLR, must be served in the same manner as a summons (CPLR 2303, 6313 [b]) . . . .

Id. at 475-76 (emphasis added).

OAG further misreads *Lurie* when it argues that the references in that decision to CPLR 308 (for personal service upon individuals) mean that CPLR 311 (for service on corporations) should govern cases like this one, where the "respondents are business entities." (OAG Br. 62.) The Court in *Lurie* referred to portions of CPLR 308 only insofar as those provisions could supply meaning to the phrases in "delivering" and "leaving" as used in Gen. Bus. L. § 355. That is why,

for example, the Court held that leave-and-mail service under CPLR 308(4) would only comply with CPLR 355 under a "very liberal" construction of the words "delivering" and "leaving." *Id*. at 475. The Court did *not* suggest that the service mandates of Gen. Bus. L. § 355 can simply be substituted by CPLR 308 or 311.

3. Even If CPLR 311(b) Applied to Gen. Bus. L. § 354 Proceedings, OAG Has Not Met Its Requirements

Even if CPLR 311(b) were to apply here, OAG does not come close to meeting its requirements.

As a threshold matter, when Justice James ordered service upon outside counsel in the *ex parte* § 354 Order, she could not possibly have made a determination as to the "impracticability" of regular methods since OAG concededly never mentioned CPLR 311(b) in its papers, nor included *any* discussion of the difficulty of regular service. (A39-64; *compare* Resp. Br. 20 (discussing this point) *with* OAG Br. 59-62.) In fact, OAG's papers to Justice James did not mention the governing service standards under Gen. Bus. L. § 355 either — showing either carelessness or a lack of candor with the Court — and instead simply provided draft language allowing service on outside counsel. (A38.)

OAG appears to be arguing that, since its papers "contained facts showing that . . . service on respondents themselves would have been impracticable" (*id*. at 60), this Court can somehow reach back in time to "uphold" a determination under CPLR 311(b) that Justice James never actually made. That is wrong. A "court

may only direct an alternate method of service 'upon motion' seeking such relief"; no alternate service is allowed where a "plaintiff did not request that relief in her motion." *Wishni v. Taylor*, 75 A.D.3d 747, 748 (3d Dep't 2010).

In *DeCarvalhosa v. Adler*, 298 A.D.2d 293 (1st Dep't 2002), for example, the trial court "deem[ed] plaintiff's attempts at service a nunc pro tunc application for a court-ordered improvised service," and found the service sufficient. *Id*. at 295. This Court reversed because the statute required that "court-ordered service be authorized only 'upon motion without notice'' and the plaintiff "made no such motion" for alternative service. *Id*. at 295; *see also* 2 Weinstein, Korn & Miller, New York Civil Practice: CPLR ¶ 308.15 (2019) (court cannot "order expedited service sua sponte"). Here, OAG *never* made any motion under CPLR 311(b).[2]

Finally, even if this retroactive exercise were permissible, OAG's stated grounds for impracticability — that Bitfinex and Tether are located abroad (OAG Br. 60) — is insufficient. A "corporate defendant's location in a foreign country does not, standing alone, provide a basis for court-ordered service"; the "plaintiff

[2] While OAG states in a footnote that it *did* make a "motion" (OAG Br. 60 n.9), that appears to be a reference to OAG's § 354 petition, which nowhere addressed alternative service. OAG cannot retroactively transform its petition into a different type of application. In *Wishni*, for example, the Third Department rejected alternate service because the plaintiff had only made a motion for an extension of time to serve, not a motion for alternate service. 75 A.D.3d at 748.

must make a detailed showing of actual impracticability." CPLR 311(b), Practice Commentaries § C311:3. OAG never tried to make the required showing.

C. The Respondents Preserved Their Service Challenge

The trial court correctly found that Bitfinex and Tether did not forfeit, but rather "expressly preserved," their right to challenge service. (A13 n.4; Resp. Br. 21-23.) OAG's opposition does not dispute the following critical points:

- that in a special proceeding a "respondent may raise an objection in point of law by . . . a motion to dismiss the petition," CPLR 404(a);

- that a respondent in its answer or a first motion to dismiss *always* may raise service or other jurisdictional defects, *see* CPLR 3211(e); CPLR 320, Practice Commentaries, ¶ C320; and

- that Bitfinex and Tether challenged service in their first motion to dismiss.

(*Compare* Resp. Br. 21-23 *with* OAG Br. 54-59.)

OAG nonetheless clings to its forfeiture argument by contending, first, that "[t]his appeal does not involve a special proceeding," but instead some sort of undefined procedural creature that cannot be the subject of a motion to dismiss (OAG Br. 57); and, second, that the Respondents' emergency motion to vacate,

which expressly stated that they were preserving their jurisdictional objections, somehow waived those same objections. Both of these assertions are necessary for OAG's forfeiture argument; both are frivolous.

Contrary to OAG's brief, this matter *is* a special proceeding and hence under CPLR 404(a) may be challenged by a motion to dismiss. The CPLR is explicit that all "proceedings shall be prosecuted in the form of an action, except where prosecution in the form of a special proceeding is authorized." CPLR 103(b). This establishes that every proceeding is "either an action or a special proceeding, thus removing the 'procedural no man's land'" that might otherwise exist for cases that do not neatly fit either descriptor. 1 Weinstein, Korn & Miller, New York Civil Practice: CPLR ¶ 103.05 (2019); *see also Nowak v. Wereszynski*, 21 A.D.2d 427, 430 (4th Dep't 1964) (same). Before this case, OAG always described its § 354 cases as "special proceedings."[3] OAG cites no authority for its flip-flop.

[3] *See, e.g.*, RJI, *In re Letitia James v. Edelstein, et. at.*, Index No. 450416/2019 (April 10, 2019) (checking the box describing case as a "Special Proceeding"); Memorandum of Law, *In re Schneiderman v. Eichner, et al.*, Index No. 451536/2014 (July 25, 2014), at 1 ("In this special proceeding commenced pursuant to his powers under the Martin Act, the New York Attorney General seeks injunctive relief and discovery . . . .); Memorandum of Law, *In re Schneiderman v. 15 Broad Street, LLC, et al.*, Index No. 450454/2014 (Feb. 28, 2014), at 1 ("In this special *ex parte* proceeding commenced pursuant to his powers under the Martin Act, the Attorney General seeks to enjoin and obtain discovery . . . .); Summons, *State v. Van Zandt*, No. 0450713-2012 (May 16, 2012), 2012 WL 1748139, at ¶ 25 ("The public investigation was initiated by authority of an Order issued April 8, 2011. . . in the special proceeding pursuant to GBL § 354 . . . .).

OAG likewise cites no authority holding that filing a motion to vacate (particularly when done, as here, on an emergency basis) is a waiver of jurisdictional objections raised in a subsequent motion. While OAG argues that *Addesso v. Shemtob*, 70 N.Y.2d 689 (1987), holds that a "party's failure to raise a personal-jurisdiction objection prevents it from later raising the objection" (OAG Br. 54-55), that is a gross misrepresentation. In *Addesso*, the Court found that a defendant waived its jurisdictional objection only because it failed to raise that objection in its motion to dismiss. *Id*. at 690. In other words, the defendant there failed to do exactly what the Respondents here *did* do.

Addesso did not suggest that a jurisdictional objection not raised at the earliest conceivable time is forever waived, and the law is to the contrary. Even "substantial activity" in litigation "does not deprive [a litigant] the right to object to jurisdiction," so long as that activity occurs "before the defendant's time to answer" or move to dismiss. *Parrotta v. Wolgin*, 245 A.D.2d 872, 873 (3d Dep't 1997). This includes, for example, opposing a preliminary injunction (what functionally occurred here), *Matter of Town of Clarkstown v. Howe*, 206 A.D.2d 377, 377 (2d Dep't 1994), or noticing a deposition and moving to compel compliance, *Al-Dohan v Kouyoumjian*, 93 A.D.2d 714, 716 (1st Dep't 1983).

If that were not enough, an independent basis to conclude that Bitfinex and Tether preserved their service challenge is that they expressly stated in their

emergency motion to vacate — brought just three business days after the *ex parte* § 354 Order — that they were preserving their right to do so, since their emergency application was "focused on ameliorating the immediate harm wrought by the Attorney General's improper *ex parte* order." (A359 n.1; *see also* Resp. Br. 21-22.)

While OAG argues that this allegedly "perfunctory" reservation was insufficient (OAG Br. 55 & n.8), OAG relies on cases where the allegedly "perfunctory" argument was raised in the trial court briefing for the very motion on appeal. In those cases, the appeals court was effectively being asked to consider an argument for the first time that was not sufficiently developed below. Here, Bitfinex and Tether are only appealing the trial court's denial of their motion to dismiss, where the point was raised in great detail. (A518-19.)

Finally, to the extent the Court is nonetheless inclined to agree with OAG's waiver analysis, the Court in all events retains the "discretion" to allow Bitfinex and Tether to belatedly "include an objection to personal jurisdiction." *Russell v. Arthur Trask Co*., 125 A.D.2d 136, 138 (3d Dep't 1987). In the unusual procedural posture here, where no court has found a waiver on similar facts, and where the Respondents' motion was made within 30 days of the case being filed, the Court should at a minimum exercise its discretion to consider the service challenge on the merits — and should conclude that service was improper.

II. Bitfinex and Tether Lack a Connection to New York Sufficient for Personal Jurisdiction

Even if Bitfinex and Tether had been served properly, the trial court would still lack personal jurisdiction over them because the proceeding does not arise from conduct purposefully directed towards New York. (Resp. Br. 23-31.) OAG's scattershot examples of New York activity are misleading, and fall far short of proving the necessary nexus to New York.

1. OAG's Claims Do Not Arise from Conduct Purposefully Directed Towards New York

To establish personal jurisdiction, a plaintiff must show that the underlying dispute is "directly related to, and arise[s] from" the defendant's activity in the forum. *Storch v. Vigneau*,162 A.D.2d 241, 242 (1st Dep't 1990). "When no such connection exists, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781 (2017).

Here, OAG points to *zero* New York connections having to do with the underlying controversy that gave rise to the § 354 proceeding — namely, that, following the difficulties in accessing funds from Crypto Capital in late 2018, Bitfinex and Tether entered into a line-of-credit transaction that rendered misleading earlier statements about what was "backing" tethers. (A80-84 ¶¶ 72-93.) (As discussed, these allegations are demonstrably false.)

OAG cannot point to any New York connections relating to that claim because the events occurred long after Bitfinex and Tether banned U.S. and New York customers and otherwise have nothing to do with activity in New York. (A500-03 ¶¶ 7-15; A741-42 ¶¶ 15-20; Resp. Br. 23-29.) There is no suggestion, for example, that the line-of-credit transaction at issue, or the disputes with Crypto Capital, occurred in or had anything to do with New York.

OAG tries to avoid this problem by arguing that the dispute over tethers' backing "is just one potential ground" for its investigation, and that there exist unspecified other grounds that it need not "preview" for the Court or anyone else. (OAG Br. 52.) From this starting premise that OAG's investigation could be about anything under the sun, OAG effectively argues that *all* New York contacts count towards establishing personal jurisdiction. That is why, for example, OAG points the Court to a miscellaneous grab bag of contacts, such as Bitfinex and Tether hiring vendors that are located in New York (*see* OAG Br. 26) and that have nothing to do with OAG's underlying claim. (A743 ¶ 26.)

The Court should reject OAG's arguments because they collapse into one the separate doctrines of general and specific personal jurisdiction. Further, OAG's framing ignores the narrow strictures of Gen. Bus. L. § 354. Under § 354, OAG can only initiate a proceeding after it has "determined" to sue on a particular claim, and can only obtain documents that "relate" to that claim. Gen. Bus. L.

§ 354. The Respondents' opening brief asked what "logical reason" there could be for allowing the jurisdictional analysis to extend beyond the bounds of the statute to unrelated claims for which OAG has made no determination at all (and which, by the statute's plain terms, could not be the subject of discovery). (Resp. Br. 29.) OAG supplies no answer, except to refer to its flawed mantra (discussed above) that the Court should not allow Bitfinex and Tether to halt OAG's investigation.

For these same reasons, OAG is wrong to rely on cases like *Matter of La Belle Creole Int'l., S. A. v. Attorney General*, 10 N.Y.2d 192 (1961), which recognized that government agencies are given broad leeway as to the appropriate subject matters for an investigative subpoena. (OAG Br. 41-42.) The unique device of Gen. Bus. L. § 354 is not the same as an investigative subpoena, because it includes what this Court described in *Lurie* as "'extraordinary enforcement powers' in the form of *ex parte* injunctive relief." 176 A.D.2d at 475. Further, unlike an investigative subpoena, the discovery authorized by Gen. Bus. L. § 354 is expressly limited to material that "relates" to a claim OAG has already "determined" to bring. Gen. Bus. L. § 354.

While OAG argues that this determination need not be a "final decision" (OAG Br. 52 (quoting *Matter of Gonkjur Assoc. v. Abrams*, 88 A.D.2d 854, 856 (1st Dep't 1982)), that does not erase the statutory language requiring a nexus between the scope of discovery and the specific claim OAG has "determined" to

bring (even if that determination could be revisited). Nothing in § 354 suggests it is a roving and open-ended investigative tool, or that § 354 should duplicate or supplant the powers associated with other investigative tools.

Even if this dispute had arisen in the more flexible context of an investigatory subpoena, OAG's attempt to have an unbounded scope is still highly misguided and insufficient to proceed here. The primary case OAG relies upon, *La Belle*, illustrates the point. There, the Court of Appeals exercised jurisdiction because the subpoena target, a Panamanian liquor company, took orders in a "systematic and continuing fashion through an agent with an established and permanent place of business in this State," without complying with the statutory requirement to be registered. 10 N.Y.2d at 198. In other words, the Court connected what the target was doing in the state (liquor sales) with what OAG was enforcing (the liquor licensing regime). That is what is missing here.

2. OAG's Examples of New York Activity Are Misleading, Irrelevant, or Both

OAG cites various New York contacts that supposedly establish personal jurisdiction, but in each case OAG is either distorting the record or citing material having nothing to do with the claim under which this proceeding arose — or both. For example:

- OAG argues that the trial court "found" that an executive of Bitfinex and Tether lived in New York (OAG Br. 44), but the cited

portion of the trial court's opinion is *not* to any factual findings. Rather, the trial court wrote that "OAG *represents* that its ongoing investigation has found" various facts, such as the executive's residence (A10-11 (emphasis added)), and the cited evidence, in turn, is the unsupported say-so of an OAG attorney. (A542 (¶ 38).) There is no evidence this employee had anything to do with the claims at hand.

- OAG also argues that the trial court "found" that OAG's investigation "dat[es] back to at least January 2015," when New York customers were allowed on the Bitfinex and Tether platforms. (OAG Br. 45.) Again, this was not a factual finding. In the cited passage, the trial court wrote that "Petitioner *notes* ... that her investigation concerns Respondents' activities dating back to at least January 2015." (A10 (emphasis added).) And the authority cited by the trial court is yet another example of the bare say-so of OAG's lawyer: "The OAG's investigation is concerned with, among other things, the activities of Respondents and their operation of the Bitfinex trading platform dating back to at least January 1, 2015. (A536 ¶ 8; *see also* A538 ¶ 17 (same allegation as to Tether).) What activity from January 2015 is at issue? That is

left unsaid. Whatever it is, the activity cannot have anything to do with the Crypto Capital liquidity issue that first arose in late 2018 and that gave rise to this proceeding.

- OAG points to evidence supposedly showing that Bitfinex and Tether "on-boarded" a New York customer in 2018 (OAG Br. 45, 50), but the customer was a foreign company that OAG is confusing with its U.S. affiliate. (A740 ¶¶ 11-12.) Here and elsewhere, OAG appears to believe that it can ignore the corporate form and treat foreign companies as identical to their affiliates, owners, or employees. But it cites nothing for that extraordinary proposition except a case holding that partnerships are treated as having the citizenship of their members for purposes of establishing federal diversity jurisdiction. (OAG Br. 51 (citing *Americold Realty Trust v. Conagra Foods, Inc*., 136 S. Ct. 1012, 1015 (2016).) Diversity jurisdiction for removing cases to federal court has nothing to do with the standards for personal jurisdiction.

- OAG argues that Bitfinex and Tether counseled a customer how to "bypass" the ban on U.S. customers (OAG Br. 50), but cites *nothing* for that incendiary charge. Based on the briefing below, it

appears OAG intended to refer to an email in which Bitfinex's general counsel was seeking assurances that a customer was "not registered with the SOS, pays no taxes in NY, no employees in NY, no office in NY." (A555.) This shows efforts to *enforce* the ban, not to skirt it. (*See also* A739 ¶ 9.)

- OAG claims that Bitfinex and Tether entered into an agreement to loan tethers to a "New York-based virtual currency trading firm" (OAG Br. 25), but again cites nothing for its claim. Here, too, the borrower was a foreign entity. (A739 ¶ 7.)

Beyond these examples, Bitfinex and Tether refuted each of OAG's alleged New York connections in its sworn evidence below. (A738-45 ¶¶ 3-34.) Without repeating that evidence in full, the Court should bear in mind two broader points.

First, even if the Court finds isolated examples of pertinent New York contacts, that does not amount to the necessary "substantial relationship" between the claims and the forum, or "purposeful" availment. *Johnson v. Ward*, 4 N.Y.3d 516, 519 (2005) (*see also* Resp. Br. 25 (collecting cases).) Bitfinex and Tether have deliberately avoided doing business in New York, and should correspondingly not be dragged into court here.

Second, the trial court committed legal error in finding personal jurisdiction based solely on what OAG "has represented to the Court" (A18), and without considering or addressing the contrary evidence from Bitfinex and Tether and without making factual findings. The trial court appeared to believe *prima facie* allegations were enough. (A17.) But this Court has held that the burden of proving personal jurisdiction must be met with "evidence," not "bare allegations." *Concotilli v. Brown*, 168 A.D.3d 426, 426 (1st Dep't 2019).

The trial court's approach was particularly inappropriate given that the parties had already completed jurisdictional discovery, with Bitfinex and Tether having produced 70,000 pages of documents. (A746 ¶ 38.) *Accord Melnick v. Adelson-Melnick*, 346 F. Supp. 2d 499, 502 (S.D.N.Y. 2004) (after jurisdictional discovery, a plaintiff's jurisdictional grounds must be "factually supported") (citations omitted). Ignoring that jurisdictional discovery was completed, OAG repeatedly decries as "perverse" Bitfinex and Tether highlighting the lack of evidence "while at the same refus[ing] to produce relevant documents." (OAG Br. 3, 29, 54.) Given the extensive jurisdictional discovery, the real reason OAG cannot marshal enough evidence on jurisdiction is that the evidence does not exist.

The trial court ignored that evidence, apparently on the erroneous belief that jurisdiction could be premised on allegations alone. This Court at a minimum should remand for a review of the evidence under the proper standards.

III. The Trial Court Lacked Subject Matter Jurisdiction

As an independent basis to dismiss, the trial court should have concluded that tethers fall outside the Martin Act, instead of deferring the question. (Resp. Br. 32-39.) OAG's opposition brief largely repeats the errors of the trial court, suggesting that it needs a full record to before the question can be answered. (OAG Br. 35-40.) This is backwards, as OAG's authority should *precede* it obtaining substantive relief, like the onerous injunction in place today.

A. The Trial Court Should Have Decided That the Martin Act Does Not Reach Tethers

This proceeding involves the OAG bringing to bear upon Bitfinex and Tether the "extraordinary enforcement powers in the form of *ex parte* injunctive relief," *Lurie*, 176 A.D.2d at 475, plus potentially wide-ranging discovery. The trial court should not have granted this substantive relief without addressing the logically antecedent question of whether OAG even has statutory powers reaching tethers — that is, whether there was subject matter jurisdiction under the Martin Act. (OAG takes issue with the description of this issue as involving subject matter jurisdiction (*see* OAG Br. 33 n.4), but that is exactly how the case law, discussed below, describes the issue and in all events the label makes no difference to the question of whether OAG is or is not acting within its statutory powers.)

That an agency's power should be resolved first is not a novel proposition. The Court of Appeals has held "that no agency of government may conduct an

unlimited and general inquisition into the affairs of persons within its jurisdiction," but, rather, "[t]here must be authority, relevancy, and some basis for inquisitorial action." *A'Hearn v Committee on Unlawful Practice of Law*, 23 N.Y.2d 916, 918 (1969). Consistent with the "authority" requirement, the court in *Gardner v. Lefkowitz*, 97 Misc. 2d 806 (N.Y. Sup. Ct. 1978), correctly ruled that "a precondition for the issuance" of an OAG subpoena was "subject matter jurisdiction on which the issuance can rest." *Id*. at 810. Other courts similarly recognize that a court enforcing a subpoena must "assur[e] itself that subject matter jurisdiction" exists — *i.e*., that "the subject matter of the investigation is within the statutory jurisdiction of the subpoena-issuing agency." *Federal Election Comm'n v. Machinists Non-Partisan Political League*, 655 F.2d 380, 386 (D.C. Cir. 1981).[4]

The grounds for establishing subject matter jurisdiction here *before* enforcement are even stronger than in *Gardner* and *Machinists* because this case goes far beyond subpoena enforcement for discovery. OAG has already obtained a preliminary injunction affecting the Respondents' business.

We are aware of no case where an agency's statutory reach was challenged, but a subpoena was enforced, anyway, without resolving the point. OAG argues

[4] While OAG argues that the rule in *Machinists* is limited to cases raising sensitive First Amendment concerns (OAG Br. 40 n.6), the D.C. Circuit never said that, and its rule has been applied in business cases with no constitutional valence. *See, e.g.*, *FTC v. Ken Roberts Co.*, 276 F.3d 583, 587 (D.C. Cir. 2001) (applying *Machinists* standard in case involving marketing of securities).

that it finds support in *Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327 (1988) (OAG Br. 34-35), but that is wrong. There, the Court of Appeals upheld OAG's subpoenas to beer companies as part of an antitrust investigation under the Donnelly Act. The beer companies argued that their alleged misconduct — establishing exclusive distribution territories — was clearly legal, but the Court of Appeals disagreed, finding that those arrangements might be illegal "if shown to result in an unreasonable restraint of trade." *Id*. at 333. In the language OAG seizes upon, the Court held that, since the legality of the practice was not "free from doubt," OAG should be permitted to investigate further. (OAG Br. 34 (quoting 71 N.Y.2d at 332).)

Here, by contrast, the question is whether the product at issue (tether) is even within the statutory reach of Martin Act in the first place. Bitfinex and Tether are not trying to prove in advance as to what the evidence would or would not show on the merits of whether the alleged conduct would violate the Martin Act. They are simply pointing out that tethers fall outside the Martin Act entirely. This is quite different from *Abrams*, where there was no dispute that the Donnelly Act applied to the beer business.

OAG next argues that the trial court could not resolve the scope of the Martin Act without a full record (OAG Br. 33), but the reason tethers are not securities or commodities has to do with well-known, intrinsic features of how

tethers and other stablecoins work. (Resp. Br. 35-37.) While OAG speculates that tethers "might qualify as securities" because evidence could show that they "are held for investment purposes" (OAG Br. 35), that is self-evidently false. Customers may redeem tethers from Tether only for the amount paid — without interest. (A184 ¶ 9.) It makes no sense to "invest" in them. And any hypothetical "profit" could only arise from secondary market trading, not, as required under the governing test, "from the efforts of" Tether, which only promises customers from the start a redemption at par (not any profit). *S.E.C. v. W.J. Howey Co*., 328 U.S. 293, 298-99 (1946); *see also Lehman Bros. Comm'l Corp. v. Minmetals Int'l Non-Ferrous Metals Trading Co*., 179 F. Supp. 2d 159, 164 (S.D.N.Y. 2001) (products where profit is based on "market forces" and not on the issuer's "entrepreneurial efforts" are not securities). OAG identifies no other fact questions that further discovery would illuminate.

B. OAG Does Not Dispute That It Forfeited Any Argument That Tethers Are Securities or Commodities

Once it is acknowledged that the trial court should have addressed whether tethers fall within the Martin Act, OAG's opposition collapses, given that OAG does not dispute its forfeiture of the question in the briefing below. (*Compare* Resp. Br. 38 (discussing OAG's forfeiture) *with* OAG Br. 31-40 (not disputing it).) That is, OAG never even *tried* before the trial court to justify how tethers could qualify as securities or commodities. (*Id*.)

OAG barely even attempts to do so on appeal, either, arguing only what "may" be revealed on a hypothetical, larger record. (OAG Br. 35.) That halfhearted speculation is plainly insufficient to establish OAG's statutory authority or subject matter jurisdiction.

C. Subject Matter Jurisdiction Cannot Be Predicated on Other Virtual Currencies

OAG next argues that subject matter jurisdiction can be based on the fact that its investigation supposedly covers not only tethers, but also anything else on the Bitfinex platform, including any of "one hundred virtual currencies" that "may be a security of commodity." (OAG Br. 33.) What other currencies are at issue? What is the suspected fraud associated with them? OAG does not say. And none are mentioned in OAG's original § 354 application, which was focused on tethers *only* and which to this day stands as the foundation for an onerous preliminary injunction. It is hardly "myopic," as OAG alleges (OAG Br. 34), for Bitfinex and Tether to focus on the one product raised in OAG's § 354 application.

Perhaps most absurdly, OAG now argues that the subject matter jurisdiction of the trial court can be based on the Respondents' "recent issuance of LEO tokens" (OAG Br. 33-34) — a product that did not even exist until *after* the § 354 Order had been issued. (A744 ¶ 30.) The LEO issuance, which barred U.S. buyers, cannot rewind the hands of time so as to retroactively provide a statutory basis for this proceeding. If OAG wants to use § 354 to explore LEO or any other

products, it is free to utilize any of the other components of its investigatory arsenal, rather than trying to shoehorn a boundless investigation into the § 354 proceeding now before the Court.

CONCLUSION

For all of these reasons, and those in the Respondents' opening brief, the Respondents respectfully request that the Court reverse the trial court's decision and dismiss this proceeding.

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