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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 90

MAURICE GREENBERG,

Appellant.

20 Eagle Street
Albany, New York 12207
May 03, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

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1 CHIEF JUDGE DIFIORE: Good afternoon.

2 The first matter on this afternoon's calendar is
3 number 90, People v. Maurice Greenberg.

4 Counsel.

5 MR. BOIES: Thank you, Your Honor and may
6 it please the court. My name is David Boies, and I
7 represent Appellant Greenberg.

8 We have two remedy issues here. One,
9 disgorgement, the other, injunctive relief.

10 CHIEF JUDGE DIFIORE: Pardon me, counsel.
11 Would you like rebuttal time?

12 MR. BOIES: I would, Your Honor. Thank you
13 very much. Could I reserve three minutes?

14 CHIEF JUDGE DIFIORE: Yes, sir.

15 MR. BOIES: Thank you.

16 We respectfully suggest that the disgorgement
17 claim that the Attorney General has recently raised be
18 barred for five independent reasons. First, AIG, the
19 company that paid the bonuses, has settled its
20 disgorgement claim. Under Applied Card, just as
21 restitution was held to be barred in that case, another
22 equitable remedy, when you have a specific settlement of
23 the party allegedly to be - - - have been deprived of
24 money by this improper conduct. In this case, AIG - - -

25 JUDGE PIGOTT: You make the point, earlier

1 on, that this is a late coming - - - I'm aiming this
2 really at your opponent when I ask you this question.
3 Why does it take so long to, you know, if the - - -
4 if the - - - my view of disgorgement is there is
5 something sitting over here that, in this case the
6 defendant should not have, we want it, so we're suing
7 to get it. But this is like ten years later.

8 MR. BOIES: It is, Your Honor. And I think
9 the - - - I think the practical fact is, and I don't
10 think counsel will disagree, is this came into the
11 case only because its damages claim was barred by
12 Applied Card. And so they scrambled and tried to
13 come up with some other remedy that would go forward.

14 They - - - counsel told the court quite
15 candidly, when we were here in 2013, that they were
16 still just examining the possibility - - - the
17 possibility was her words, of a disgorgement claim.

18 They didn't have a disgorgement claim; they
19 told the court they didn't have a disgorgement claim
20 in 2007. They told them - - - they told the court
21 they had a fraud in the market claim. What happened
22 was, when that fraud in the market claim disappeared,
23 they tried to come up with some other remedy. One of
24 the points I'm going to make at the end - - -

25 JUDGE STEIN: Well, they - - - they had - -

1 - they had indicated early on at the pleading stage,
2 didn't they - - -

3 MR. BOIES: In - - -

4 JUDGE STEIN: - - - that they were going
5 to make this claim; it wasn't the first time it ever
6 came up, right?

7 MR. BOIES: In the complaint they said
8 alleged disgorgement.

9 JUDGE STEIN: Okay.

10 MR. BOIES: That was in 2005.

11 JUDGE STEIN: Um-hum.

12 MR. BOIES: In 2007 though, and this is at
13 page 290 of the record, the court says there is no
14 disgorgement here, and they say, in effect, that's
15 correct, and they say, it's a fraud in the market
16 case, not a disgorgement case. So they - - - and
17 they didn't put it in the note of issue at all that
18 was filed in 2011.

19 So by the time we got here, it was
20 absolutely clear the disgorgement was not part of the
21 claim. And indeed, counsel quite candidly told the
22 court when we were here before, that they were just
23 examining the possibility of adding a disgorgement
24 claim. And when counsel wrote the letter in April of
25 2013, saying that they wanted to continue the case,

1 they talked about injunctive relief, but they did not
2 even mention disgorgement.

3 JUDGE RIVERA: So counsel, if I could just
4 - - - is it your position that the court is stripped
5 of its inherent equitable remedial powers but for
6 those listed in section 353 and 353-A is a broader
7 catch-all, but only with respect to receivers. So is
8 your position that there is no other authority that
9 the court has available under its equitable powers?

10 MR. BOIES: It is - - - it is our position
11 that under the specific rules of the Executive Law
12 and the Martin Act, the Attorney General is limited
13 to the remedies that are specified there. Now, under
14 common law fraud, they have much broader remedies.
15 And remember, they had a common law fraud claim here
16 in this case, and they dropped it.

17 JUDGE RIVERA: So then why doesn't the
18 court have - - - why doesn't the court have its own
19 inherent power - - -

20 MR. BOIES: Because what the - - -

21 JUDGE RIVERA: - - - to fashion a remedy
22 for violations of this statute?

23 MR. BOIES: Because what the Martin Act and
24 the Executive Law does, is it tells the court what
25 remedies they can impose. And that's obviously

1 something that's up to the legislature. And the
2 legislature specifically listed certain remedies and
3 didn't list others, and the legislature has
4 repeatedly amended these laws to add additional
5 remedies. I mean, for example - - -

6 JUDGE STEIN: Well, can't - - - can't that
7 be viewed in two way- - - I mean, they argued that -
8 - - that the reason for that is that every time
9 somebody came along and said, well, you can't do this
10 because it's not in the statute, and they added that,
11 and they sort have been, I don't know, the tail
12 wagging the dog or something, I - - -

13 MR. BOIES: And - - - and Your Honor, it
14 may often be that the legislature does respond to
15 court decisions that limit remedies, when the
16 legislature thinks additional remedies ought to be
17 appropriate.

18 But that doesn't mean that the court can
19 just add additional remedies when the legislature has
20 specifically listed the remedies. And this is not a
21 situation like the federal securities laws, where the
22 SEC is given broad powers to just adopt any equitable
23 remedy they want. This is one where the Martin Act
24 and the Executive Law specifically list certain
25 remedies. And some of those remedies have been

1 added. Both were - - - in 1970, for example, the
2 Executive Law was amended to add restitution. In
3 1977, it was amended to add damages. In 1923, the
4 Martin Act was amended to add the judgment relief.

5 JUDGE RIVERA: But the statute doesn't say
6 these are the only remedies available, correct?

7 MR. BOIES: No, but the general principle
8 of exclusio unius, as well as common sense, says that
9 if you had all the remedies in the world, you
10 wouldn't have to keep amending to add specific ones.

11 JUDGE FAHEY: Was - - -

12 JUDGE STEIN: Yeah, but doesn't this say in
13 further relief clause under - - - I know it's stuck
14 in the receivership section, but doesn't it say that
15 it covers any action under this article, not just
16 under that section? I mean, what do we do with that?

17 MR. BOIES: And - - - and indeed, I think
18 the court has to look at whether the fact that it's
19 in the receivership section, it's not in the other
20 sections, it's never been appl - - -

21 JUDGE STEIN: But it's not limited to this
22 section, and it talks about all - - -

23 MR. BOIES: I think if you read it in
24 context, Your Honor, I think the most logical way is
25 to read it, because if - - -

1 JUDGE RIVERA: Do you think it's a
2 scrivener's error?

3 MR. BOIES: No, I don't think it's a
4 scrivener's error; I think they just put it into the
5 - - - to the 350-A, where - - - A - - - where it was
6 intended to be.

7 JUDGE ABDUS-SALAAM: Yeah, but - - -

8 MR. BOIES: If it - - - if it covered the
9 whole waterfront, Your Honor - - -

10 JUDGE ABDUS-SALAAM: Mr. Boies, but it
11 relates to the entire article. So if they just
12 wanted to limit it to receivership, they didn't have
13 to say this article; it could have been this section.

14 MR. BOIES: I think the problem, Your
15 Honor, with that is that if it really applied
16 everywhere, there would be no need for the specific
17 provisions of restitution and damages. In other
18 words, if you had all the remedies in the world, you
19 wouldn't need to specifically add restitution.

20 JUDGE FAHEY: Well, under that logic then,
21 3017, the CPLR, would it be applied the same way, and
22 the Constitutional designation of the court's powers
23 of equity would be applied the same way.

24 The argument fails because if merely - - -
25 if one list precludes everything else, then there

1 could never be a general power of equity granted to
2 the court, ever. It would always have to be
3 specified in every situation. The logic doesn't
4 follow through.

5 MR. BOIES: But, Your Honor, I respectfully
6 suggest that with respect to the Executive Law and
7 the Martin Act - - -

8 JUDGE FAHEY: Um-hum.

9 MR. BOIES: Those are very specific
10 statutes, and they have very specific remedies.

11 JUDGE FAHEY: And once again, we're back to
12 the 353-A argument. But - - -

13 MR. BOIES: We are.

14 JUDGE FAHEY: But the specificity problem
15 is undermined, I think, with the fact that across our
16 statutes, the residual power of equity is left in the
17 courts in a number of instances where specific
18 remedies are provided in statute. So that's why I'm
19 saying, the logic is - - -

20 MR. BOIES: I don't want to - - -

21 JUDGE PIGOTT: Mr. Boies, let me - - - let
22 me - - - pardon me, but I would - - - let's assume
23 for a minute you've got all of these releases, you
24 got all of the settlements, you got, I mean,
25 everything is pretty much wiped off the board, and

1 somebody says, hey, somebody has got a bank account
2 in the Canary Islands. Now, can - - - that's the
3 kind of stuff I picture is being disgorged. In other
4 words, almost a res identifiable, and you go after
5 it.

6 Would that apply, and obviously not in this
7 particular case, but in a situation like that, they
8 could go for disgorgement to say, we want, you know,
9 that bank account that we didn't know about before,
10 right?

11 MR. BOIES: I think - - - I think there are
12 areas where you could go for disgorgement, Your
13 Honor.

14 But I want to come back to what I started
15 with, which is this is a case where we settled. AIG
16 settled these disgorgement claims. This is like
17 Applied Card. This is a case in which those claims
18 have been settled. If you believe the res judicata
19 argument of Applied Card, if you believe the
20 Constitutional principles that this court applies in
21 Applied Card, because of that settlement,
22 irrespective of what the Martin Act and the Executive
23 Law generally provide, it ought to be barred in this
24 particular case.

25 And that's particularly true, because under

1 the Federal Supremacy Clause, we have to give
2 deference to the SEC settlement that actually
3 provided for disgorgement.

4 JUDGE FAHEY: Would it be different - - -
5 would it be different if it was settled as to
6 restitution, as opposed to disgorgement; if we see
7 those as two different things then - - -

8 MR. BOIES: Yes.

9 JUDGE FAHEY: Yeah, go ahead.

10 MR. BOIES: I think that's exactly right,
11 Your Honor. Restitution and disgorgement are two
12 separate things; in the Applied Card, they settled
13 restitution, but did not settle disgorgement.

14 JUDGE FAHEY: Right.

15 MR. BOIES: So the court said, you can't
16 get restitution, but you can - - - you might be able
17 - - - might be able to get disgorgement. Here, they
18 settled disgorgement, they settled - - - specifically
19 settled disgorgement. In fact, they settled it
20 twice; they settled it - - -

21 JUDGE RIVERA: Well, there was no dis - - -
22 I'm sorry, was there disgorgement - - -

23 MR. BOIES: Yes, Your Honor.

24 JUDGE RIVERA: - - - or was it just
25 release of the claims?

1 MR. BOIES: Well, there was a release of
2 the claims. There was seven-and-a-half million
3 dollars of disgorgement pursuant to a federal court
4 order.

5 JUDGE RIVERA: Do we know if that's - - -
6 and do we know if that's a disgorgement - - - a
7 complete disgorgement of all the illicit - - -
8 alleged illicit profit?

9 MR. BOIES: From our perspective, it was
10 more than that. From their perspective, it was less
11 than that - - -

12 JUDGE RIVERA: I understand, but what they
13 have - - - but don't they have - - -

14 MR. BOIES: - - - but from the SEC
15 standpoint - - -

16 JUDGE RIVERA: I understand, but don't they
17 have the right to be able to persuade the trier of
18 fact that perhaps the court - - - its equitable
19 power, excuse me, has - - - that not all the illicit
20 profit has been - - - if they establish illicit
21 profit has been disgorged, and they want the
22 difference?

23 MR. BOIES: But that's exactly what this
24 court holds they could not do in Applied Card.
25 That's exactly what they argued in Applied Card.

1 They didn't get all the restitution. We need more
2 restitution in order to make people whole. But this
3 court said, no. Once you have that final judgment,
4 that's the end of it.

5 And I want to get just very - - - my time is up,
6 I see.

7 CHIEF JUDGE DIFIORE: Thank you, counsel.
8 Counsel.

9 MR. SAMA: Good afternoon, Your Honor.
10 Vincent Sama from Kaye Scholer for Mr. Smith.

11 I would like to reserve one minute of the three
12 for rebuttal.

13 I want to stay on the Applied Card point that
14 Mr. Boies just ended up on.

15 Here, it is clear the SEC specifically claimed
16 disgorgement against both appellants. And there was a
17 settlement, you know, a compromise, and a release.

18 JUDGE STEIN: But when that - - - when that
19 settlement took place, everybody knew what was going
20 on here, didn't they?

21 MR. SAMA: In this case?

22 JUDGE STEIN: Yeah.

23 MR. SAMA: Yes, of course. Just like when
24 this class action settlement case was in the
25 securities case, they knew about that too.

1 And this cou - - - and they dropped the
2 securities claims because the restitution and damages
3 was settled with the shareholders, so there was no
4 more claim for restitution and damages.

5 That's why three weeks before we came to
6 this court, they dropped those claims. And then they
7 sat there and said, what else could we do, because
8 there's no damages here. They conjured up
9 disgorgement in a very tentative way, if you read the
10 transcript, because it didn't exist. They didn't
11 address - - - I - - - we tried - - - it wasn't before
12 this court, disgorgement, but the SEC had that claim.
13 So now when they bring it, it's the exact same point.

14 Applied Card, look at a situation where
15 someone had a claim, restitution, here it's
16 disgorgement, it's compromised and settled, and the
17 court in that case specifically said, the principles
18 of res judicata win, notwithstanding the fact that
19 the Attorney General still thinks they have a claim
20 for restitution and want to deter people from future
21 Martin Act and Executive Law violations. They
22 specifically said, res judicata wins out. And in
23 this case, we have that.

24 JUDGE STEIN: Does it matter that we're
25 talking about different, we'll call them victims, if

1 you will.

2 MR. SAMA: Well, no, it doesn't matter,
3 because the people who - - -

4 JUDGE STEIN: So that in restitution, it's
5 restitution to the victims. What have - - - what are
6 they out, okay, whereas disgorgement serves a
7 different purpose. And in one case, the argument
8 goes that, you know, the SEC settled disgorgement for
9 a different set of victims than the AG now sees.

10 MR. SAMA: Yeah, there are different people
11 with their claims. The People had that the
12 disgorgement claim, AIG and the SEC actually asserted
13 them in court cases, and they gave them up. So there
14 - - -

15 JUDGE STEIN: But this - - - what I'm
16 saying is that this isn't - - -

17 MR. SAMA: Yes.

18 JUDGE STEIN: - - - this isn't for AIG or
19 the SEC; this is for the public.

20 MR. SAMA: But the public - - - no, they
21 aren't the public. The public doesn't have any
22 rights to disgorgement; the disgorgement is who gave
23 up the money. And the people that give up the money
24 here would be - - - the shareholders are gone and AIG
25 paid the compensation that they're trying to claw

1 back. AIG is the party that provided that money, and
2 they gave us a release, in a context - - -

3 JUDGE FAHEY: It sounds like restitution to
4 a victim - - -

5 MR. SAMA: No.

6 JUDGE FAHEY: As opposed to dis - - - well,
7 I disagree with you; it sounds like restitution to a
8 victim.

9 MR. SAMA: Well - - -

10 JUDGE FAHEY: Go ahead, you could - - -

11 MR. SAMA: Sure, I will, yeah, just - - -

12 JUDGE FAHEY: Yeah.

13 MR. SAMA: AIG paid their compensation in
14 bonus. They asserted a claim in Delaware Chancery
15 Court for disgorgement; that's what they denominated
16 to get back the compensation.

17 In that context of the case, we settled it,
18 and they released us from those claims. They gave a
19 release in a case that they specifically alleged
20 disgorgement. That's totally distinct from
21 restitution and damages. What the shareholders
22 asserted in the case before Judge Batts in the
23 Southern District, what was (indiscernible).

24 So quite frankly, if you look at this case,
25 step back a second, all - - - the two - - - these two

1 appellants settled cases for restitution and damages,
2 and for disgorgement, notwithstanding that, because
3 they - - - the Attorney General knows they have no
4 other monetary remedy; they're still trying to push
5 this claim against these two appellants, where they
6 have no claim. There is no monetary claim here,
7 there is none.

8 If you're going to apply Applied Card and the
9 rules that come out of the case, disgorgement must come
10 out of the case.

11 CHIEF JUDGE DIFIORE: Thank you, sir.

12 MR. SAMA: Thank you.

13 CHIEF JUDGE DIFIORE: Counsel.

14 What about your appellant's res judicata
15 argument?

16 MS. UNDERWOOD: The res judicata argument
17 has no application here. Disgorgement, as has been
18 noted, is not about who the money goes to, it's about
19 removing from people who committed fraud, the
20 proceeds, the benefits, the profits, the ill-gotten
21 gains.

22 And it would be appropriate for the court,
23 the trial court on remand, to consider the factual
24 question whether they have actually disgorged all
25 their ill-gotten gains or not. We allege that they

1 have not.

2 JUDGE PIGOTT: So this is like a post-
3 judgment remedy?

4 MS. UNDERWOOD: Yes.

5 JUDGE PIGOTT: So you're just - - - all you
6 want is a hearing, and to put somebody on the stand,
7 and say, how much money you got, and how much money
8 did you owe us, and how much of that is illegal, and
9 you're done in about a day and a half.

10 MS. UNDERWOOD: And I will say also - - -
11 yes, and also the - - -

12 JUDGE PIGOTT: Why did it take ten years to
13 get to this point?

14 MS. UNDERWOOD: Well, as - - - as we've
15 said, and as it's perfectly appropriate to
16 acknowledge, when the case appeared to involve
17 billions of - - - a very large amount of damages,
18 disgorgement, though alleged, was a small amount in
19 comparison to that.

20 When the - - - when we gave up - - - when
21 restitution was settled, and we didn't have that
22 claim anymore, it became more appropriate and
23 important to focus on the disgorgement. And I might
24 say that - - -

25 JUDGE PIGOTT: This - - -

1 JUDGE ABDUS-SALAAM: But counsel, did you -
2 - - is Mr. Boies correct that you gave up
3 disgorgement in 2007?

4 MS. UNDERWOOD: Not at all. If you - - -
5 if you look at the transcript where - - - where that
6 is discussed, the question is, is this a - - - is
7 this a case where you're trying to get money back
8 from particular investors and the claim, and we say,
9 no, this isn't that kind of a - - - this isn't an
10 insider-trading case; we're not looking for that kind
11 of rest - - - of disgorgement.

12 It wasn't a discussion about disgorgement
13 as - - - as a whole. Nor, by the way, did we give it
14 up in this court where we said, it hasn't been fully
15 developed yet, but we intend now to pursue it.

16 JUDGE PIGOTT: Well, let's talk about that
17 for a minute. I mean, usually when you sue somebody
18 and you say, you know, you want this kind of stuff,
19 you get discovery, you know, you get interrogatories,
20 you get, you know, all types of ways of defending
21 yourselves, and it does read the way - - - the way
22 Mr. Boyd was suggesting that this was, you know, it's
23 about like an any and all other relief that, to the
24 court, might seem just, proper, and equitable.

25 That does not mean you got a disgorgement

1 claim in every single case. And - - -

2 MS. UNDERWOOD: No, but we specifically
3 alleged disgorgement, not just any - - -

4 JUDGE PIGOTT: I know you did; I was just
5 using that as an example. But you alleged it and
6 then nobody did anything about it.

7 MS. UNDERWOOD: Well, I've - - - I've
8 stated the reason for that. It was - - -

9 JUDGE PIGOTT: But well, no, you're missing
10 my point. You've got a good reason for not doing it.
11 You're not chasing billions. But in the meantime,
12 there is somebody there who doesn't think you're
13 going after disgorgement, because you're not - - -
14 nothing is happening with it. And I'm wondering why
15 there wasn't more discovery, wasn't - - - I picture
16 if somebody comes after someone, they got, like I
17 suggested to Mr. Boies, you got a res somewhere. You
18 got, you know, money somewhere, you got a boat
19 somewhere, you got something somewhere that you want
20 to grab.

21 MS. UNDERWOOD: The res here - - -

22 JUDGE PIGOTT: It's gone ten years ago.

23 MS. UNDERWOOD: No, the res here, when we -
24 - - I don't know that it's appropriate to call it a
25 res, is performance related bonuses.

1 JUDGE PIGOTT: Bonuses.

2 MS. UNDERWOOD: We said that - - - I said
3 that in court when I was here three years ago, we now
4 have stated that that is what we're looking for, the
5 - - -

6 JUDGE PIGOTT: But didn't you know there
7 were bonuses a long time ago, and didn't you know how
8 much they were for, and didn't you make any attempt
9 to keep them in the case, so to speak?

10 MS. UNDERWOOD: We alleged disgorgement, we
11 did not pursue it actively when we were pursuing
12 something else.

13 JUDGE PIGOTT: I mean, if I was trying to
14 settle this case with the SEC and everyone else, one
15 of the things I would want to make sure of is that
16 I'm protected. And so, I would settle, settle,
17 settle and think, now I'm done, and then here comes
18 the Attorney General saying, not quite, because we
19 are now going to go after the bonuses that we alleged
20 in the addendum clause ten years ago, and now we
21 brought that to the floor.

22 MS. UNDERWOOD: Actually, at the point at
23 which these various other - - - which the settlement
24 with the SEC happened, the restitution claim was
25 still alive. This - - - these defendants had no

1 expectation of finality; there was an open case from
2 - - - for a great deal of money outstanding, and it's
3 quite common to settle globally.

4 We've had that experience often when - - -
5 when a defendant is trying to settle with the United
6 States, and with the states, and with the private
7 class action, then - - - then all those settlements
8 are made often at the same time.

9 When they settled with the SEC, and then
10 with the class action, and this case was still open,
11 they - - - it's - - - it doesn't sit well for them to
12 argue that they - - - they were surprised that there
13 was still a case.

14 JUDGE PIGOTT: Mr. Sama seems to indicate
15 that Delaware has some - - - some relevance to this
16 whole - - -

17 MS. UNDERWOOD: Well, on top of all the
18 other factual questions that are appropriate for a
19 court to consider on remand, there is no evidence
20 that these individuals paid that disgorgement.

21 There is - - - in the case of the SEC
22 disgorgement, they - - - SEC insisted that they be
23 paid individually, that they not be reimbursed, that
24 they not get a credit for it against any other
25 recovery, but none of the other payments here have

1 that character.

2 So it's open to - - - for fact finding
3 about whether they still retain, in Mr. Greenberg's
4 case, it's twenty four and a half million dollars in
5 in performance related bonuses, in Mr. Smith's case
6 it's three million dollars, on the face of the
7 publicly available proxy statements that were - - -

8 JUDGE RIVERA: Counsel, if I may, it is
9 peculiar, in section 353-A, to have this last
10 sentence, is it not? Would that sentence not - - -
11 if it really refers to this article, would that not
12 be more appropriately placed in section 353 or free
13 standing?

14 MS. UNDERWOOD: Well, as you - - - if you
15 spent any time with the Martin Act, you would know
16 that there are many infelicities of drafting in it.

17 But I will say that that sentence is
18 definitely not limited to receivership cases for
19 three reasons. One, the text, as it's been
20 discussed, it refers to cases under this article, the
21 Martin Act, not under this section.

22 Two, it would make no sense if you think
23 about it, for the legislature to preserve broad
24 equitable remedies, only in the small number of cases
25 where receiverships are actually appointed.

1 That would mean the 1925 amendment had the
2 effect of shrinking the remedial authority of the
3 court, when the legislature was plainly trying to
4 expand it.

5 So the clear meaning of that sentence is to
6 confirm - - - this was the first remedial amendment,
7 to confirm that when - - - that by creating a
8 receivership remedy, the legislature wasn't removing
9 the other relief that was always available under the
10 Martin Act. This is a few years after the Martin Act
11 was enacted, and the legislat - - - the reason they
12 are enacted together is the legislature specifies a
13 remedy, and then in the same section says, but all
14 other remedies are still also available. That's why
15 they're together.

16 And the last thing I'll say is that this court
17 has repeatedly said that headings of statutory provisions
18 don't trump the plain meaning of the statutes themselves.
19 It said it most recently, I think in Suffolk Regional Off-
20 Track Betting, in 19 - - - in 2008.

21 JUDGE RIVERA: So - - - so - - - perhaps
22 you've already said it, and what you've said, if - -
23 - if, as you've argued in your brief, the court has
24 inherent equitable power, why have this sentence
25 anyway?

1 MS. UNDERWOOD: In order to make sure that
2 by specifying a new remedy, nobody thinks they have -
3 - -

4 JUDGE RIVERA: It was the sole remedy?

5 MS. UNDERWOOD: It was the sole remedy,
6 that's correct.

7 JUDGE FAHEY: Can we - - - can we just go,
8 Ms. Underwood, to just a different area for a second.
9 I just want to talk about injunctive relief and - - -

10 MS. UNDERWOOD: Yes.

11 JUDGE FAHEY: - - - the AG's position on
12 irreparable harm.

13 MS. UNDERWOOD: Let me say about injunctive
14 relief, there are three forms of injunctive relief
15 that are sought here. The simplest and easiest one
16 to talk about is the injunction against further
17 fraud, which is the standard remedy under both the
18 Martin Act, and Executive Law 6312, and I would say
19 that if that's available, that alone is enough to
20 defeat this summary judgment motion.

21 JUDGE FAHEY: Let me ask - - -

22 MS. UNDERWOOD: I want to answer your
23 question, yes.

24 JUDGE FAHEY: Wouldn't the S - - - just on
25 a further fraud - - - wouldn't the SEC injunction

1 deal with that issue?

2 MS. UNDERWOOD: No, it doesn't duplicate
3 the SEC's injunction for two reasons. One, New York
4 is entitled to seek an injunction that New York can
5 enforce, the state and the SEC may have different
6 enforcement priorities, and New York can't enforce
7 that federal injunction.

8 And two, the New York injunction would
9 reach frauds that the federal injunction doesn't.
10 Not just perhaps some securities frauds that are
11 prohibited under the Martin Act and not federally,
12 but under 6312, any fraud in business, it doesn't
13 have to be fraud in the sale of securities, it can be
14 any - - - any fraud in business which is considerably
15 broader than anything the SEC - - -

16 JUDGE FAHEY: But back to - - - but back to
17 the standard, it seems like you're proposing a new
18 standard almost.

19 MS. UNDERWOOD: No, this - - - this court
20 and - - - and the federal court that has - - - that
21 had - - - the federal courts that have looked at
22 similar injunctions say, there needs to be a reason
23 to have the injunction, some prospect of recurrence,
24 but not irreparable harm.

25 There is not an opinion that squarely says

1 that as holding from this court, I would say that
2 State v. Fine, in which the court said you need
3 irreparable harm because it was a preliminary
4 injunction that was being sought, says by implication
5 that you wouldn't need it if we weren't talking about
6 preliminary and interim relief of that sort, because
7 this is the remedy that the state legislature
8 contemplated for violations of the Martin Act, and of
9 6312.

10 MS. UNDERWOOD: It is open to the trial
11 court to decide that an injunction would serve no
12 useful purpose. But that's a fact and discretion
13 question, not a question of a legal bar in this
14 court.

15 The defendants are saying that there is a legal
16 barring to every form of relief, and that's why there
17 can't even be a trial on liability. On that theory, if
18 one remedy is available, their summary judgment motion has
19 to fail. And we'd say that all these remedies are
20 available, but one would be enough to - - - to defeat this
21 motion.

22 I - - - I do want to say something about this -
23 - - maybe the court's questions have fully ventilated
24 this, but the idea that this expressio unius maxim applies
25 here, just fundamentally misunderstands these two

1 statutes.

2 First, that doctrine just generally doesn't
3 apply to equitable remedies. Second, the history of these
4 particular statutes shows that it doesn't apply here,
5 because they were drafted to give courts broad equitable
6 power to fashion remedies for fraud, and they were amended
7 periodically to resolve doubts about specific remedies.
8 There is no indication that the legislature ever intended
9 to spell out the entire menu of available remedies.

10 And by the way, the same thing happened in the
11 federal securities law when court - - - federal courts had
12 been imposing director and officer bars as part of their
13 inherent equitable power before it was in the federal
14 statutes. And then when questions were raised, Congress
15 made it clear that those powers - - - that the power to
16 impose that bar is available.

17 JUDGE STEIN: Did you - - - did you respond
18 to the argument about Applied Card? Was that - - -

19 MS. UNDERWOOD: Yeah - - -

20 JUDGE STEIN: I think you might have
21 started to talk about that, but - - -

22 MS. UNDERWOOD: Applied Card says - - -

23 JUDGE STEIN: Preclude the disgorgement
24 here.

25 MS. UNDERWOOD: Not at all, because what

1 Applied Card says is that if the exact relief sought
2 has already been given, it can't be given again.

3 Applied Card was about restitution to
4 victims, and this court said that those victims who
5 have already settled their restitution claims, the AG
6 can't obtain restitution for them. But there's
7 nothing like that going on here with, either
8 injunctive relief, or disgorgement.

9 JUDGE PIGOTT: Am I - - - am I over
10 reading, it seemed to me when you - - - when you look
11 at everything that is going on in this case over this
12 period of time, either somebody failed when the
13 settlements happened and said, don't forget to
14 include the two things we're talking about on either
15 side.

16 I don't - - - I'm surprised that somebody
17 didn't say, and by the way, you know, everything is
18 settled, all of, you know, all the restitutions have
19 been given, and where everybody's going to go home,
20 except we're going to continue to prosecute you on,
21 you know, for disgorgement and for injunctive relief.

22 MS. UNDERWOOD: And for injunctive relief,
23 well, I don't know that anybody failed. There were
24 multiple - - - what happened over the last many years
25 was a lot of interlocutory appeals - - -

1 JUDGE PIGOTT: That's true.

2 MS. UNDERWOOD: - - - to bar reaching the
3 merits of - - - of the fraud or of appropriate
4 relief. And now, we're going in this backwards way,
5 we're finally up to relief, we haven't yet gotten to
6 liability. There is a very cart before the horse
7 quality to this whole litigation.

8 This state alleged disgorgement from the
9 beginning, it continues to seek disgorgement, it has now
10 made more precise what the form of that disgorgement would
11 take, it acknowledges that there are fact questions to be
12 resolved, but there is nothing that bars the claim in its
13 entirety, and for this court to decide without - - -
14 without sending the case back for a factual inquiry.

15 And many - - - of course, many of the issues
16 that would be relevant to any of these forms of relief,
17 many of the facts, are precisely the facts that would be
18 developed at trial. We expect to show, not just a
19 technical mistake, but a pattern of orchestrated,
20 complicated, fraudulent behavior, and opportunity to
21 continue to engage in fraudulent behavior that warrants -
22 - - that warrants relief.

23 And it would not be a good message to tell
24 fraudsters that the way - - - the roadmap to avoid
25 liability is interlocutory appeals, and - - - and

1 piecemeal settlements, and then coming back to say, this
2 case which was brought, I think before the SEC's case and
3 before the class action, somehow because we have been able
4 to delay it for so long, it now can't be brought at all.

5 CHIEF JUDGE DIFIORE: Thank you.
6 Counsel.

7 JUDGE STEIN: Mr. Boies - - -

8 MR. BOIES: Let me respond correctly to - -
9 -

10 JUDGE STEIN: Mr. Boies, can I - - - just
11 one question. If we disagree with you that the - - -
12 that this equitable relief is barred as a matter of
13 law, are there questions of fact?

14 MR. BOIES: There are questions of fact,
15 but in addition to - - - even if you conclude that
16 the Martin Act and the Executive Law permit
17 disgorgement, you still have three other really,
18 really important points here. One is the fact - - -
19 is the Applied Card rule. And the fact that this has
20 been settled.

21 And the thing I wanted to explicitly say
22 was that this was dealt with explicitly at the time
23 of settlement; disgorgement was explicitly settled.
24 This is not a question where somebody forgot to
25 settle disgorgement; they settled disgorgement.

1 Now, they settled disgorgement and
2 restitution at different times. And it's true that
3 they were piecemeal in that sense, but they were
4 piecemeal because you were dealing with different
5 parties. And we were not able to get a universal
6 settlement at one time. But those have all been
7 settled. And under Applied - - - on Applied Card,
8 that's the first thing.

9 The second thing - - -

10 JUDGE ABDUS-SALAAM: Mr. Boies, was there
11 any - - -

12 JUDGE RIVERA: Well, perhaps I'm
13 misunderstanding.

14 MR. BOIES: I'm sorry.

15 JUDGE RIVERA: Perhaps I'm misunderstanding
16 the argument, but I thought in part, the AG's point
17 was that the alleged ill-gotten gains have not been
18 disgorged, and your position is they have been
19 disgorged.

20 MR. BOIES: Yes.

21 JUDGE RIVERA: Why isn't that just a
22 question of fact, not a question of law?

23 MR. BOIES: Because - - - because, Your
24 Honor, two things. One is, as this court ruled in
25 Applied Card, once you have a final judgment, you

1 don't go back and reexamine whether that was fair or
2 complete. The same argument was made in Applied
3 Card, that we need to deter, we need to - - -

4 JUDGE STEIN: But was the AG a party to
5 that?

6 MR. BOIES: Yes, yes, absolutely. That's
7 what - - - that's what Applied Card was about. It
8 was about what remedies the AG - - -

9 JUDGE STEIN: No, I mean here, here, here,
10 was the AG a party to this SEC settlement?

11 MR. BOIES: No, but they weren't - - - they
12 weren't a party to the Applied Card settlement
13 either. They've never - - - this always arises when
14 they are not a party. And what Applied Card holds is
15 that where you have a final judgment, that's the end
16 of it.

17 Now the second thing, and this is really
18 important, Your Honor, is that where you've got the
19 federal securities laws, there are all sorts of federal
20 securities laws and court decisions that preempt various
21 things that otherwise states might do. And where you have
22 a monetary judgment, not injunctive relief here, but a
23 monetary judgment, -that is preemptive where you have a
24 lower standard of scienter, as you unquestionably do here.

25 This is exactly the argument that was before the

1 court before, and because all the damages had been
2 eliminated, and none of that was - - - they said and the
3 court agreed that it had to be directed in the first
4 instance to the trial court. We've now done that, it's
5 now back in your lap, so to speak, and - - -

6 JUDGE ABDUS-SALAAM: It wouldn't - - - if
7 we agree with you, Mr. Boies, wouldn't that allow the
8 alleged fraudster to pick the forum in which he or
9 she decides to settle a case, even with another case
10 already outstanding that might be - - - have more
11 impact in the state in which the fraud occurred?

12 MR. BOIES: I think there are two reasons
13 why that should not be a problem in this particular
14 case, Your Honor. First, what you - - - what you
15 have in this particular case is, you have the SEC
16 involved, and you have the national securities
17 actions involved, where federal law preempts state
18 action in any event.

19 And so, the proper form for that, and this
20 is true for injunctive relief as well as damages,
21 once you have an SEC order, that has preemptive
22 effect, and what - - - what has happened here is you
23 - - - it's not a question of people picking a
24 particular forum, it's a question of the particular
25 forum, the SEC being the appropriate one to resolve

1 these federal security law problems.

2 The second - - - the second reason is that in
3 this - - - in this particular case, you have had actual
4 recoveries, very, you know, very large - - - this is not a
5 situation in which you had a sweetheart deal. This is one
6 where you had AIG, which is represented by Paul, Weiss,
7 they vigorously litigated this case. This was a arm's-
8 length settlement. Here is no question here about anybody
9 maneuvering to get to the right settlement. In addition
10 to that, these same arguments were made by the Attorney
11 General in Applied Card.

12 Once you have that final - - - once you have
13 that final judgment, there are Constitutional
14 implications, as this court said, about respecting the
15 finality of those judgments. So I don't think either of
16 those concerns are going to be present here, because of
17 the Applied Card, because of the SEC, because of the
18 federal preemption. That makes this different - - -

19 JUDGE FAHEY: Can I - - - can I just - - -

20 MR. BOIES: - - - than - - - than many of
21 the other - - -

22 JUDGE FAHEY: Your time - - - your time is
23 almost up here. I - - - I just - - - on the
24 preemption argument, on the - - - the Securities
25 Limitation Act, SLUSA - - -

1 MR. BOIES: Yes.

2 JUDGE FAHEY: - - - I thought that the
3 supreme court rules that - - - that the state's
4 powers were expressly preserved - - - the state's
5 enforcement powers were expressly preserved in, I
6 think it's Merrill Lynch, Pierce, Fenner & Smith - -
7 -

8 MR. BOIES: Yes.

9 JUDGE FAHEY: Dabit, and also in Lander,
10 both.

11 MR. BOIES: Yes, Your Honor. And if this
12 were, for example, a civil penalty case, if this were
13 something other than restitution disgorgement damages
14 or the like, or - - -

15 JUDGE FAHEY: Well, that has nothing to do
16 with it. They are still part of the enforcement
17 powers, whether - - - whether - - - that's a remedy.
18 It's kind of my, I guess, not to be flippant but,
19 it's a lot.

20 MR. BOIES: I - - - but I think what the
21 supreme - - - but I think what the supreme court has
22 - - - has made clear is that where the remedies that
23 are being attempted to be enforced are remedies of
24 the nature of civil remedies, and the standard that
25 is been used has a lower level of scienter, and we

1 cited all three of the federal statutes involved here
2 in our briefs.

3 JUDGE FAHEY: But you wouldn't disagree
4 with that characterization, that those - - - those
5 enforcement powers to state regularities are
6 expressly preserved.

7 MR. BOIES: As stated that, generally no,
8 Your Honor, we would not disagree with that.

9 CHIEF JUDGE DIFIORE: Thank you, counsel.

10 MR. BOIES: Thank you, Your Honor.

11 CHIEF JUDGE DIFIORE: Counsel.

12 MR. SAMA: Just quick, I want to turn to
13 another point on - - - in the disgorgement claim,
14 aside from res judicata, it's clear that the NYAG has
15 to show a linkage between the two transactions in
16 this case, and the appellant's receipt of
17 compensation from AIG. They acknowledged that, if
18 you look at the record, R222 and R527. They acknowl
19 - - -

20 JUDGE ABDUS-SALAAM: They were trying to do
21 that at trial.

22 MR. SAMA: What? No, but - - -

23 JUDGE ABDUS-SALAAM: They were trying to do
24 that at trial.

25 MR. SAMA: We're at the summary judgment

1 stage. What we did here at the summary judgment
2 stage is the discovery was complete; there is no
3 discovery. They actually - - - we pointed out, which
4 is our burden, there was no evidence to link that.
5 They then, under this court's case in the William J.
6 Jenack Estate Appraisers case, they have the burden
7 now to demonstrate that, that there is a linkage.

8 They acknowledged that that's their burden.
9 They have no admissible evidence. At the summary
10 judgment stage, they came forward with no admissible
11 evidence to show there was any linkage between the
12 compensations and these two comp - - - these two
13 transactions.

14 And specifically, the Appellate Division
15 reversed that. The Appellate Division said that we, that
16 as the appellants, were obligated to show there was no
17 linkage. We would have to prove a negative, even though
18 it's their burden, a part of their claim to get
19 disgorgement, to show that the compensation received was
20 tied to these particular transactions.

21 CHIEF JUDGE DIFIORE: Thank you, counsel.

22 MR. SAMA: Thank you.

23 (Court is adjourned)

24

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I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Maurice Greenberg, No. 90 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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