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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE, BY SCHNEIDERMAN,

Respondent,

-against-

No. 40

CREDIT SUISSE SECURITIES (USA) LLC,

Appellant.

20 Eagle Street
Albany, New York
March 21, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

RICHARD W. CLARY, ESQ.
CRAVATH, SWAINE & MOORE LLP
Attorney for Appellant
825 Eighth Avenue
New York, NY 10019

BARBARA D. UNDERWOOD, SOLICITOR GENERAL
ATTORNEY GENERAL OF THE STATE OF NEW YORK
Attorney for Respondent
120 Broadway
New York, NY 10271

Sara Winkeljohn
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Appeal number 40, People of
2 the State of New York v. Credit Suisse Securities.

3 CHIEF JUDGE DIFIORE: Good afternoon, counsel.

4 MR. CLARY: Good afternoon, Your Honors. My name
5 is Richard Clary from Cravath, Swaine & Moore, and I
6 represent the Credit Suisse defendant-appellants. And may
7 I respectfully request two minutes for rebuttal?

8 CHIEF JUDGE DIFIORE: You may have two minutes,
9 sir.

10 MR. CLARY: Let - - - let me begin with very
11 clearly what it is we want. We - - - we believe the
12 opinions below should be reversed and that the complaint in
13 its entirety should be dismissed as time-barred under CPLR
14 214(2). There are only two counts - - -

15 JUDGE RIVERA: Counsel, you - - - do you agree
16 that if the complaint on its face is enough to make a claim
17 for either common law fraud or what they're calling
18 equitable fraud that the decisions not to dismiss are
19 correct?

20 MR. CLARY: No, Your Honor. I don't agree.

21 JUDGE RIVERA: Okay.

22 MR. CLARY: Because what they have pled are two
23 very specific causes of action that are both statutory in
24 nature and which only require limited proof, proof that
25 would not, in fact, prove common law fraud or equitable



1 fraud.

2 JUDGE RIVERA: Okay. So then you tell me what in
3 your opinion, as you read the case law and our history, are
4 the quote, unquote "elements" of equitable fraud?

5 MR. CLARY: The elements of equitable fraud, Your
6 Honor, are there needs to be reliance, there needs to be
7 injury to the - - - to the victim, so reliance by the
8 investor in this case, injury to the - - - to the investor
9 in this case, a material misrepresentation at the fraud
10 level, not at the tendency to deceive level that applies
11 for the Martin Act and the Executive Law, and since there's
12 no scienter requirement for equitable fraud, it has been
13 replaced by a requirement that there be some special
14 relationship or other basis for equity to be invoked. And
15 that prong is important - - -

16 JUDGE RIVERA: And what - - - what's the
17 decisional law basis for this summary of the elements?
18 What case can I go look at that tells me those are the
19 elements of equitable fraud?

20 MR. CLARY: Well, I think, for instance, this
21 court's Connaughton decision from last year discussed fraud
22 and said whether it's at law or in equity there has to be
23 reliance that produced injury and it has to be adequately
24 alleged in the complaint. And so this court affirmed the
25 dismissal, in that case, a fraudulent inducement claim,



1 where those elements were found to be missing.

2 JUDGE FAHEY: So would you see the types of fraud
3 that - - - legal fraud that we can following along a
4 continuum from common law fraud, which includes scienter
5 and reliance, to the Martin Act and the Executive Law which
6 just include material misrepresentation with equitable
7 fraud being in the middle including reliance but not any
8 form of - - - of severe falsity or scienter.

9 MR. CLARY: Yes. I would put equitable fraud
10 almost right next to common law fraud. I actually find it
11 easier, Your Honor, to think of it as an archery target and
12 you have the bullseye in the center. And the bullseye is
13 common law fraud and maybe slightly around it is equitable
14 fraud with all of the elements that have to be proven to
15 win for that. And - - -

16 JUDGE FAHEY: I like the bullseye analogy. It's
17 good. It's good.

18 MR. CLARY: And everything else is the Martin Act
19 and Executive Law 63(12) and the Attorney General can win
20 as long as they prove anything anywhere on the target. And
21 in this case, they affirmatively told us and the lower
22 courts that they were not intending to prove reliance and
23 not intending to prove scienter which would be - - -

24 JUDGE FEINMAN: So we're in the outer ring,
25 right?



1 MR. CLARY: So that we're in the outer ring, and
2 to be in the outer ring in order to establish liability all
3 they have to prove is the tendency to deceive standard and
4 materiality.

5 JUDGE FAHEY: Well - - -

6 JUDGE FEINMAN: But - - - but I just want to be
7 clear. So - - - so if that's true you're basically
8 conducting a case-by-case analysis of this particular
9 complaint. You're not suggesting, are you, that anytime
10 the Attorney General is invoking the Martin Act that if
11 that particular complaint happens to have the elements of
12 common law fraud or equitable fraud in addition to a Martin
13 Act and Executive Law claim, you're not suggesting that
14 those would also require a three-year statute of
15 limitations?

16 MR. CLARY: To be clear, Your Honor, I think the
17 three-year statute of limitations under 214(2) applies to
18 any Martin Act claim where the Attorney General seeks to
19 impose liability based on the Martin Act. So for instance,
20 if there was a complaint that both alleged a Martin Act
21 violation and a common law fraud violation, two separate
22 counts, the three years would still apply to the Martin Act
23 because to win it all they have to prove are the stripped-
24 down limits in Martin.

25 JUDGE FEINMAN: So - - - so we have to actually



1 look at - - -

2 MR. CLARY: Six-year - - -

3 JUDGE FEINMAN: - - - how the build it in the - -
4 - in the complaint as opposed to what the facts are that
5 they've alleged?

6 MR. CLARY: Yes, Your Honor. The - - - the trial
7 court would turn to the portion of the complaint that says
8 and here are our counts, Count I we sue under the Martin
9 Act.

10 JUDGE FEINMAN: So in this case, paragraph 73
11 through 76?

12 MR. CLARY: Right. So they're suing under the
13 Martin Act, and then they're suing under Executive Law
14 63(12) where they recite just the words of Executive Law
15 63(12) and then add in parenthesis including inter alia
16 multiple violations of the Martin Act. So - - - which we
17 interpret as meaning that it's a Martin Act claim and the
18 Executive Law claim is piggy-backing on the Martin Law - -
19 - Martin Act claim, and therefore, they both attract the
20 same statute of limitations.

21 JUDGE RIVERA: Yeah. But we - - - we have
22 liberal pleading standards, and so as long as you can look
23 at the complaint anywhere and find - - - let's say with
24 your argument allegations of common law fraud, the
25 complaint survives, and they can continue for that common



1 law fraud. Let's say we agreed with you on the statute of
2 limitations issue, correct?

3 MR. CLARY: Where I would disagree, Your Honor,
4 is statute of limitations has to be decided normally at the
5 beginning of the case. It's raised on a motion to dismiss
6 to see whether or not the case should proceed. So I think
7 the question is not - - - and the way the court analyzed it
8 in Gaidon II is not based on can I find allegations that
9 will add up to something other than the counts that are
10 actually pleaded. In Gaidon II and in Motor Vehicles
11 before that, a decade before, you do a claim - - -

12 JUDGE RIVERA: But your - - - your own - - -

13 MR. CLARY: - - - versus a claim.

14 JUDGE RIVERA: Your own bullseye analogy is that
15 common law flawed - - - fraud - - - maybe flawed - - -
16 fraud is the center of the larger, right, bullseye?

17 MR. CLARY: Yes, Your Honor. But - - -

18 JUDGE RIVERA: So as long as those elements are
19 properly alleged and there's a factual basis for it and you
20 have to assume the facts as presented or true for purposes
21 of the motion to dismiss, you move on. I - - - I
22 understand your point about the statute of limitations, but
23 if you've - - - if you satisfy those elements there - - -
24 they can then move on. They may not be able to prove it,
25 of course. That's a different story because that's a



1 different standard once we move past the motion to dismiss.

2 MR. CLARY: Your Honor, where I disagree with
3 you, respectfully, is if they're going to allege common law
4 fraud they have to bring a common law fraud claim. If they
5 want to allege an Executive Law 63(12) claim premised on -
6 - -

7 JUDGE RIVERA: You mean if they had put the wrong
8 title at the top of their cause of action, their claim, but
9 everything in it contained every element that you would
10 agree is the element required for common law fraud you'd
11 still have to dismiss that complaint?

12 MR. CLARY: Well, Your Honor, we - - - that isn't
13 the instance we have here, and I don't think the Attorney
14 General would ever make that simple a mistake in a
15 complaint. I think they're very clear. They were very
16 clear on what they were alleging, and they were very clear
17 on the trial court on what they intended to prove and what
18 they didn't intend to prove. And they said we're not
19 proving scienter and we're not proving reliance, and they
20 have steadfastly refused to give us any discovery.

21 JUDGE RIVERA: That's based on that letter
22 response; is that correct?

23 MR. CLARY: They also said it during the oral
24 argument of the motion to dismiss, Your Honor, which is in
25 the - - - in the record, as well.



1 JUDGE RIVERA: All right.

2 MR. CLARY: They have consistently throughout
3 this case said we're not going to prove reliance and we're
4 not going to prove scienter and we're not going to give you
5 any discovery on those subjects. So they have never been
6 pretending that this was a common law fraud claim or an
7 equitable fraud claim. It has always clearly been a
8 statutory claim.

9 CHIEF JUDGE DIFIORE: Thank you, counsel.

10 MR. CLARY: Thank you.

11 CHIEF JUDGE DIFIORE: Counsel.

12 MS. UNDERWOOD: May it please the court, Barbara
13 Underwood for the State. The complaint in this case
14 alleges misrepresentation to investors of material facts
15 relating to the sale of securities. That is a classic,
16 long-recognized wrong for which equitable relief was
17 available before any relevant statute was enacted,
18 Bloomquist is one such case, Hammond is another, and we've
19 cited these cases.

20 JUDGE FAHEY: Can - - - Ms. Underwood, can I stop
21 you for just one second?

22 MS. UNDERWOOD: Yes.

23 JUDGE FAHEY: The - - - I - - - your analysis - -
24 - the argument I think you're presenting is the same
25 argument that the AD said, basically that the acts targeted



1 wrongs that existed before the statute - - - statutes were
2 enacted. And I guess my problem here is that the question
3 here isn't the wrongs, but really the question for a
4 statute of limitation purposes is what elements have to be
5 proven. So let me just - - -

6 MS. UNDERWOOD: No, I don't think that's - - - I
7 don't think - - -

8 JUDGE FAHEY: Let me just - - - let me just
9 finish my thought.

10 MS. UNDERWOOD: Yes, of course.

11 JUDGE FAHEY: And then you - - - I'd like you to
12 respond. And so the elements that have to be proven are the
13 five elements of common law fraud as - - - as opposed to
14 the lesser elements for both equitable and Martin Act
15 situations. How - - - how do you get around the fact that
16 you're - - - you're not proving scienter or reliance in
17 either circumstance and the three-year statute then doesn't
18 apply?

19 MS. UNDERWOOD: Okay. I have - - -

20 JUDGE FAHEY: Go ahead.

21 MS. UNDERWOOD: I have several things to say
22 about it. One, I think this court has not said there has
23 to be a pre-existing cause of action. It said there has to
24 be a pre-existing wrong.

25 JUDGE FEINMAN: Is it wrong or a remedy?



1 MS. UNDERWOOD: Wrong. What the court said in
2 Cortelle was that as long as the wrong is the same new
3 remedies and new standing don't change - - - don't call
4 into play 214(2). And - - -

5 JUDGE STEIN: Well, but we've also said it's not
6 enough that it's akin to something else.

7 MS. UNDERWOOD: That's right.

8 JUDGE STEIN: Right? And - - -

9 MS. UNDERWOOD: That's right.

10 JUDGE STEIN: And that at the very least whether
11 the elements of the cause of action are the same is a
12 factor to be considered.

13 MS. UNDERWOOD: I - - - I think that's right.
14 Maybe I should go - - -

15 JUDGE STEIN: Right? So - - -

16 MS. UNDERWOOD: - - - right to the scienter and
17 reliance points which is the absence of scienter certainly
18 doesn't mean these statutes address a new form of wrongful
19 conduct because courts were providing relief in the form of
20 rescission, for one, and other kinds of - - -

21 JUDGE STEIN: But you're not seeking rescission
22 here.

23 MS. UNDERWOOD: No, we're not. That's a remedy
24 point. But the wrong - - - it was wrongful to make a
25 material representation with respect to - - -



1 JUDGE STEIN: But you couldn't bring a claim for
2 the relief you're seeking under the common law.

3 MS. UNDERWOOD: I think the point that we're
4 discussing is whether a different remedy brings - - -
5 whether when a statute provides for a different remedy it
6 is creating something new and statutory or not. And what
7 this court has said - - - and there's good reason for which
8 I'll get to, if I may, but this court has said new remedies
9 don't make an old wrong new. They just provide new
10 remedies, new standing, new enforcement mechanisms. So
11 recision and other equitable remedies established long ago
12 that this conduct without scienter was wrongful. And what
13 we have in these statutes is new Attorney General authority
14 to address those old wrongs.

15 JUDGE RIVERA: So - - - so let me just understand
16 for myself - - -

17 MS. UNDERWOOD: Now reliance is a separate
18 question and I'd like to turn to that.

19 JUDGE RIVERA: Yes, let me just ask, though,
20 this. So then what is the essence - - - assuming we agree
21 with you, what is the essence of the - - - the wrong?

22 MS. UNDERWOOD: The - - -

23 JUDGE RIVERA: Is it just misrepresentation
24 that's material or is there something else?

25 MS. UNDERWOOD: It's a misrepresentation that is



1 material. A misrepresentation that is material in
2 connection with - - - here it's in connection with the sale
3 of securities which itself was an old pre-existing wrong.

4 JUDGE STEIN: Can you - - - can you cite any
5 state cases in which - - - that held that reliance is not
6 an element of equitable fraud?

7 MS. UNDERWOOD: Okay. This is reliance now? I'm
8 - - -

9 JUDGE STEIN: I'm - - - I'm talking about
10 reliance.

11 MS. UNDERWOOD: We were talking about scienter
12 and now - - - now on reliance, again, I will say it's not a
13 question of the elements of the action. It's a question of
14 wrongfulness, and my submission on that is that reliance -
15 - -

16 JUDGE STEIN: No, what - - - is - but wouldn't
17 that - - - if your argument is correct, right, then
18 wouldn't we have said that as to the deceptive act and
19 practices act under General Business Law?

20 MS. UNDERWOOD: No, and this is the point - - -

21 JUDGE STEIN: Why?

22 MS. UNDERWOOD: - - - that I think has been
23 confused in - - - in some of the briefing here. The
24 history of the deceptive practices act is that it was
25 enacted in order to reach beyond pre-existing wrongs so



1 that fraud under the Martin Act was said in Federated Radio
2 to be very broad but to address all pre-existing wrongs.
3 Fraud under 63 - - -

4 JUDGE STEIN: And others. And others.

5 MS. UNDERWOOD: No, I think just pre-existing
6 wrongs and fraud under 63(12) was said to be the same as -
7 - -

8 JUDGE STEIN: Well, why would it be necessary to
9 - - - to address pre-existing wrongs if it was exactly the
10 same as the common law?

11 MS. UNDERWOOD: To give the Attorney General
12 preventive enforcement power, and that is also going to be
13 my answer to this point about reliance. The innovation of
14 the Martin Act wasn't the scope of conduct that was
15 prohibited. It was to authorize the Attorney General to
16 act preventively, to prevent fraudulent practices from
17 causing harm. Initially, it was only about - - - it only
18 authorized injunctive relief, appointing a receiver, taking
19 steps to prevent these harms from happening because the
20 traditional individual private actions to redress harm that
21 had already occurred wasn't sufficient. That was the
22 innovation of the Martin Act. And prevention, of course,
23 by its very nature doesn't wait for reliance. The whole
24 point of this was for the Attorney General to come in and
25 stop the frauds from happening, prevent them from

1 happening, enjoin them, bar people who engaged in them from
2 dealing in securities. There's a whole array of preventive
3 remedies. Those aren't the only remedies, but those were -
4 - - that's the origin of this statute and they were
5 initially the expressed remedies of this statute. So the
6 Martin Act and then 63(12), the innovation of that was
7 simply - - -

8 JUDGE RIVERA: But based on misrepresentations
9 that had been made - - -

10 MS. UNDERWOOD: Based on misrepresentations that
11 have - - -

12 JUDGE RIVERA: - - - are material.

13 MS. UNDERWOOD: I suspect if somebody announced
14 they were going to make misrepresentations, you know, there
15 could be an injunction to - - - to stop that. But the - -
16 - the ordinary course would be misrepresentations that had
17 been but that might not yet have been relied on. That
18 might not yet have caused harm, and the Attorney General
19 was given the authority to come in and stop it. And that
20 is why - - -

21 JUDGE FAHEY: Maybe I'm misunderstanding but it
22 seems that the - - - the - - - we're back to the elements
23 of common law fraud, equitable fraud, and the Martin Act.
24 And common law fraud has the toughest standard, the Martin
25 Law - - - Act has - - - has the lowest standard. And if I



1 understand correctly what you're saying is - - - is that
2 the Martin Act doesn't require reliance. I would agree
3 with that. But equitable fraud does.

4 MS. UNDERWOOD: Yes, but - - -

5 JUDGE FAHEY: So in that situation is it a six or
6 three? It seems the law is it's six.

7 MS. UNDERWOOD: It's - - - it's the - - -

8 JUDGE FAHEY: For equitable fraud and three for
9 the Martin Act.

10 MS. UNDERWOOD: No.

11 JUDGE FAHEY: So - - - so - - -

12 MR. CLARY: Because the Martin - - -

13 JUDGE FAHEY: Let me finish my - - - let me
14 finish my thought.

15 MS. UNDERWOOD: Yes, of course.

16 JUDGE FAHEY: If that - - - that being the case,
17 Ms. Underwood, then, you would have to have pled reliance
18 in an - - - in an equitable fraud form. That's my - - -
19 that's my thought, anyway.

20 MS. UNDERWOOD: I - - -

21 JUDGE FAHEY: And you go ahead and respond.
22 Yeah.

23 MS. UNDERWOOD: I under - - - that is - - - that
24 is essentially the - - - Credit Suisse's position. And
25 what I'm trying to explain is that the wrong - - - the



1 wrong that all these statutes are about - - - 349 I put to
2 one side. The wrong of - - - of equitable fraud, the wrong
3 of - - - addressed by the Martin Act, and the wrong
4 addressed by the fraud component of 63(12) - - - we have to
5 put aside illegality because that could come from old or
6 new statute or not statute. But the fraud component of
7 63(12) is the same language. They took exactly the same
8 language that was in the Martin Act and put it in 63(12),
9 so those two statutes stand together to address the same
10 fraud. And then 349 is the only one that reached
11 additional conduct, that this court correctly observed in
12 Gaidon was conduct that wouldn't rise to the level of
13 fraud.

14 JUDGE STEIN: Let's - - - let's assume that
15 63(12) and the Martin Act are - - - are the same for
16 purposes of what has to be proven. But 63(12) can be based
17 on other things besides the Martin Act, right?

18 MS. UNDERWOOD: Yes.

19 JUDGE STEIN: So - - - so - - -

20 MS. UNDERWOOD: Or the - - - fraud - - - and it
21 was here.

22 JUDGE STEIN: So - - -

23 MS. UNDERWOOD: This was - - -

24 JUDGE STEIN: So you - - - are you saying that
25 when it comes to 63(12) we have to look at the individual



1 allegations in the complaint so that 63(12) may sometimes
2 be subject to a six-year statute of limitations and other
3 times to perhaps a three-year statute of limitations?

4 MS. UNDERWOOD: Well, as to illegality, that is
5 certainly true because if a - - - 63(12) is persistent
6 fraud or illegality. If the illegality comes from a
7 statute then we're talking - - - and is new in the statute
8 then a 63(12) based on a statute comes from whatever the
9 period is under the statute - - -

10 JUDGE STEIN: I don't know if this is possible
11 but if it is - - - what if it was based on General Business
12 Law?

13 MS. UNDERWOOD: The Martin Act you mean?

14 JUDGE STEIN: No, no, no.

15 MS. UNDERWOOD: Oh.

16 JUDGE STEIN: The 63(12), there was a 63(12)
17 cause of action, could you do that?

18 MS. UNDERWOOD: I'm sorry, a 63(12) action based
19 on - - -

20 JUDGE STEIN: On a violation - - -

21 MS. UNDERWOOD: 349?

22 JUDGE STEIN: Yeah, yeah. Is that possible?

23 MS. UNDERWOOD: If it was based on 349 then it
24 would take the statute of limitations from - - -

25 JUDGE STEIN: Okay.



1 MS. UNDERWOOD: - - - from 349.

2 JUDGE STEIN: So it depends on how it's pled is
3 what you're saying?

4 MS. UNDERWOOD: At that level, at the level of is
5 it fraud or is it illegality? If it's fraud the word
6 "fraud" in the Martin - - - in 63(12) means the same thing
7 as the word "fraud" in - - - in the Martin Act. I will say
8 that there is an open question what you do if a statute - -
9 - and you could say this about the Martin Act too, if it
10 covers some old fraud and some new fraud, that's not our
11 submission. Our submission is that all fraud covered by
12 the Martin Act in 63(12) was old fraud, not redressable in
13 the way it is here, but it was pre-existing harm, pre-
14 existing fraud. And therefore, all fraud cases under
15 63(12) should get the six-year statute.

16 JUDGE RIVERA: But in 63(12), you have to show
17 that it's persistent - - -

18 MS. UNDERWOOD: Yes.

19 JUDGE RIVERA: - - - fraud.

20 MS. UNDERWOOD: That is the - - - that is the - -
21 -

22 JUDGE RIVERA: That's the difference you're
23 saying between these two when it comes to fraud?

24 MS. UNDERWOOD: Yes. Another difference is that
25 63(12) doesn't - - - isn't secur - - - it doesn't have to



1 be in securities. It - - - it extended the - - - the
 2 general remedial scheme of - - - of the Martin Act to the
 3 marketplace outside of securities fraud. It - - - it found
 4 that to be a successful or a desirable mechanism and it
 5 extended that mechanism to the marketplace outside of - - -
 6 outside of securities. Here, of course, we are talking
 7 about the securities. I - - - I think there's there an
 8 important to understand. I don't know if you want me to
 9 stop because my time is running here but - - -

10 CHIEF JUDGE DIFIORE: You may have a moment or
 11 two.

12 MS. UNDERWOOD: About - - - to understand 214(2),
 13 to understand the statute, the - - - the category liability
 14 created by statute, it has consistently been given a narrow
 15 interpretation by this court applying only to newly created
 16 rules of conduct. And there's a good reason, and that's
 17 because it's a default rule for an extremely wide variety
 18 of possible claims. And so it's not really tailored well
 19 to any one of them and should be resorted to only when
 20 there's really no alternative. It was certainly not
 21 enacted in reference to the Martin Act or 63(12) as Credit
 22 Suisse has suggested. To the extent the drafters were
 23 thinking of any particular kinds of claims, the legislative
 24 history shows what they were thinking of.

25 In 1848, in the enactment of the Field Code, they



1 gave six years to this category, liability founded on a
2 statute. And they explained in the Commissioner's report
3 that's in our main brief addendum at 20 and 21. They
4 explain that most liability created by statute is rather
5 like contract. It suits against corporate stockholders and
6 officers and they should get the same limitations this
7 contract. And then in 1962, when the CPLR was enacted they
8 made - - - the drafters made the period for liability
9 created by statute three years with the advisory committee
10 report, which is at 129 of our addendum, saying actually
11 now most claims raised by statute are rather like torts,
12 are rather like negligence, and they were looking at
13 workplace safety rules and - - - and provisions of that
14 sort that were - - - where the alternative was going to be
15 the three years for negligence so there was kind of a rough
16 justice idea that most statutory claims are of one kind or
17 of the other. But that in any case, it was very rough
18 justice. It wasn't going to actually be right for every
19 claim. And I think that's part of why it makes sense and
20 part of why the court's jurisprudence has emerged to apply
21 the 214(2) statutory category narrowly, essentially only
22 when you have to. And when there is a pre-existing wrong
23 you use the statute of limitations for that pre-existing
24 wrong.

25 CHIEF JUDGE DIFIORE: Thank you, counsel.



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Mr. Clary.

MR. CLARY: Thank you - - - thank you, Your Honor. Let me start by saying I understand why my opponent wants to put 349 over to the side, but it can't. 349, as this court has recognized and many of the lower courts have recognized and as they recognized in their amicus brief in Gaidon II, was modeled on the - - - the slimmed-down liability of the Martin Act which - - - and then Executive Law 63(12) was modeled on the Martin Act. So it's the Martin Act has a tendency to - - -

JUDGE FEINMAN: So - - - so then what do we do with the broad definition of fraud, though, that's in the Martin - - - in Federated Radio that was the very first case, you know, interpreting the Martin Act.

MR. CLARY: Yes, Your Honor. And that's entirely consistent with my argument. It is - - - the Martin Act is as broad as the mind can imagine, and that's exactly why liability under the Martin Act is broader than pre-existing liabilities under these more rigorous doctrines of the common law fraud or equitable fraud. It's exactly because Federated Radio said the Martin Act is the best investor statute New York is ever going to have - - - and frankly, that the country is ever going to have - - -

JUDGE FEINMAN: So - - - so to rule your way what do we do with the Cortelle?

1 MR. CLARY: Yes, Your Honor. On Cortelle, which
2 is a 63(12) claim, this court recognized that 63(12) has
3 two types of liability. It actually uses that terminology.
4 It says it could have - - - it can cover existing
5 liabilities and it can cover new types of liabilities. And
6 then it has a compare with citation to lower court cases,
7 and the two representing new liability are two cases
8 comparing Executive Law 63(12) and saying that's like the
9 Martin Act. So that's the new type of liability in the
10 Cortelle opinion whereas the compare with is another case -
11 - - so those two cases are People v. Beavis and People v.
12 Interstate Tractor. And there is a cite to another case
13 which a holding of an Executive Law 63(12) liability where
14 it recites that they have proven every single element of
15 common law fraud, and that's the old type. And then the
16 court - - - this court said - - -

17 JUDGE RIVERA: But - - - but if we have these
18 cases that the Solicitor General has already referred to
19 where you don't need the scienter, you don't need the
20 reliance, but the - - - it's recognizing fraud, how is it
21 that we can hold in your favor?

22 MR. CLARY: Because fraud at the level of the
23 Martin Act is a different creature, a much broader
24 creature, than common law fraud or equitable fraud. It
25 covers a multitude of sins. As counsel just said, there's



1 no requirement of reliance. That's obviously very
2 different from any type of liability for fraud that existed
3 previously. They've always eliminated scienter which was
4 required for common law. They say it eliminates the need
5 to prove any kind of injury - - -

6 JUDGE RIVERA: I'm sorry - - -

7 MR. CLARY: - - - to the consumers.

8 JUDGE RIVERA: Are you saying then that the cases
9 referred to by the Solicitor General do not say what she
10 represents they say which is that you don't need those
11 elements nevertheless to show fraud?

12 MR. CLARY: No, I'm saying they do say what she
13 says which is you don't need those elements to prove Martin
14 Act fraud, and you don't need those elements to prove
15 Executive Law 63(12) fraud unless it is piggy-backing on an
16 honest-to-goodness common law fraud claim which was the
17 court had in Cortelle. You actually have the Cortelle
18 complaint in the addendum to the reply to the amicus brief
19 in this case, and you will see that it recites count-by-
20 count - - -

21 JUDGE RIVERA: So those - - - those cases are not
22 dealing with fraud in - - - equitable fraud and equitable
23 remedies?

24 MR. CLARY: Equitable - - -

25 JUDGE RIVERA: Is that what you mean?



1 MR. CLARY: Yes. Equitable fraud still requires
2 reliance, still requires injury to the victim from that
3 reliance. And they're saying Martin Act and Executive Law
4 63(12), we could impose liability on you without ever
5 proving those or offering any evidence in discovery about
6 those. And that's why it is liability - - - the statute -
7 - - CPLR 214(2) talks about liabilities created by the
8 statute. It doesn't talk about wrongs. It doesn't talk
9 about conduct. It talks about liability, and this court in
10 Gaidon II showed how to do that analysis by looking at the
11 claim, looking at the elements of the claim, and then
12 looking at whatever was the claim pre-existing at either
13 common law or equity, see what the difference is - - -

14 JUDGE RIVERA: But we've also said that if the
15 statute merely provides for standing that is someone that -
16 - - or an entity that would not otherwise be able to bring
17 an action, they're now allowed to bring the action.

18 MR. CLARY: But - - -

19 JUDGE RIVERA: And that you can get remedies that
20 someone else might not have been able to get.

21 MR. CLARY: But it clearly does more than just
22 create standing, Your Honor, and it clearly does more than
23 just create remedies. It imposes a level of liability on a
24 - - - on the basis of a level of conduct that would never
25 prove either common law fraud or equitable fraud.



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CHIEF JUDGE DIFIORE: Thank you, counsel.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People, by Schneiderman v. Credit Suisse Securities (USA) LLC, No. 40 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers
Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001
Date: March 27, 2018

