SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

In the matter of the application of

THE BANK OF NEW YORK MELLON, (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures), BlackRock Financial Management Inc. (intervenor), Kore Advisors, L.P. (intervenor), Maiden Lane, LLC (intervenor), Metropolitan Life Insurance Company (intervenor), Trust Company of the West and affiliated companies controlled by The TCW Group, Inc. (intervenor), Neuberger Berman Europe Limited (intervenor), Pacific Investment Management Company LLC (intervenor), Goldman Sachs Asset Management, L.P. (intervenor), Teachers Insurance and Annuity Association of America (intervenor), Invesco Advisors, Inc. (intervenor), Thrivent Financial for Lutherans (intervenor), Landesbank Baden-Wuerttemberg (intervenor), LBBW Asset Management (Ireland) plc, Dublin (intervenor), ING Bank fsb (intervenor), ING Capital LLC (intervenor), ING Investment Management LLC (intervenor), Nationwide Mutual Insurance Company and its affiliated companies (intervenor), AEGON USA Investment Management LLC, authorized signatory for Transamerica Life Insurance Company, AEGON Financial Assurance Ireland Limited, Transamerica Life International (Bermuda) Ltd., Monumental Life Insurance Company, Transamerica Advisors Life Insurance Company, AEGON Global Institutional Markets, plc, LIICA Re II, Inc., Pine Falls Re, Inc., Transamerica Financial Life Insurance Company, Stonebridge Life Insurance Company, and Western Reserve Life Assurance Co. of Ohio (intervenor), Federal Home Loan Bank of Atlanta (intervenor), Bayerische Landesbank (intervenor), Prudential Investment Management, Inc. (intervenor), and Western Asset Management Company (intervenor),

Petitioners,

for an order, pursuant to C.P.L.R. § 7701, seeking judicial instructions and approval of a proposed settlement.

Index No. 651786-2011

Kapnick, J.

AFFIRMATION OF KENNETH E. WARNER IN SUPPORT OF:

The Institutional Investors' Response to
The Delaware Attorney General's Motion to Intervene (Motion No. 026)

The Institutional Investors' Response to
The New York Attorney General's Motion to Intervene (Motion No. 027)

WARNER PARTNERS, P.C.
950 Third Avenue, 32nd Floor
New York, New York 10022
(212) 593-8000

GIBBS & BRUNS, L.L.P.
1100 Louisiana, Suite 5300
Houston, Texas 77002
(713) 650-8805

Counsel for the Institutional Investors, Intervenor-Petitioners

I, Kenneth E. Warner, an attorney duly licensed to practice law in the State of New York, hereby affirm under penalty of perjury that the following is true and correct:

1. I am a member of Warner Partners, P.C., attorneys of record for the Institutional Investors in the above-captioned action. I am familiar with the proceedings in this case and make this declaration, in support of the Institutional Investors' Responses to the Delaware and New York Attorney Generals' Motions to Intervene.
2. Attached as Exhibit A is a true and correct copy of excerpts of the Indenture for CWHEQ 2006-A.
3. Attached as Exhibit B is a true and correct copy of excerpts of the Indenture for CWHEQ 2007-G.
4. Attached as Exhibit C is a true and correct copy of the New York Attorney General's Amicus Curiae Brief in *Assured Guaranty (UK) Ltd. v. J.P. Morgan Inv. Mgmt. Inc.*, 18 N.Y.3d 341, 962 N.E.2d 765 (2011) (filed July 14, 2011).

Executed this 20th day of April 2012 in New York, New York.

/s/ Kenneth E. Warner
Kenneth E. Warner

Exhibit 99.3

EXECUTION COPY

==========

CWHEQ REVOLVING HOME EQUITY LOAN TRUST,
SERIES 2006-A
Issuer

JPMORGAN CHASE BANK, N.A.
Indenture Trustee

CHASE BANK USA, NATIONAL ASSOCIATION
Co-Trustee

INDENTURE

Dated as of February 27, 2006

==========

EXECUTION COPY

THIS INDENTURE, dated as of February 27, 2006, between CWHEQ Revolving Home Equity Loan Trust, Series 2006-A, a Delaware statutory trust, and the INDENTURE TRUSTEE, as indenture trustee, and the CO-TRUSTEE, as co-trustee,

WITNESSETH THAT

Each party agrees for the benefit of the other party and for the benefit of the Secured Parties as follows.

GRANTING CLAUSE

The Issuer Grants to the Indenture Trustee, as Indenture Trustee for the benefit of the relevant Secured Parties, all of the Issuer's interest existing now or in the future in:

- the Mortgage Loans including their Asset Balances (including all Additional Balances) and the related Mortgage Files and all property that secures the Mortgage Loans and all property that is acquired by foreclosure or deed in lieu of foreclosure, and all collections received on each Mortgage Loan after the Cut-off Date (excluding payments due by the Cut-off Date);

- the Additional Loan Account;

- the Additional Home Equity Loans acquired by the Trust from funds in the Additional Loan Account;

- the Issuer's rights under hazard insurance policies related to the Mortgage Loans and the Loan Insurance Policy;

- the interest of the Issuer in the Sale and Servicing Agreement and the Purchase Agreement (including the Issuer's right to cause the Mortgage Loans to be repurchased);

- all rights under any guaranty executed in connection with the Mortgage Loans;

- the Collection Account and the Payment Account maintained to hold collections related to the Mortgage Loans and their contents; and

- all present and future claims, demands, causes of action, and chooses in action regarding any of the foregoing and all payments on and all proceeds from any of the foregoing, including all proceeds of their conversion, voluntary or involuntary, into cash or other liquid property, all cash proceeds, accounts, notes, drafts, acceptances, chattel paper, checks, deposit accounts, insurance proceeds, condemnation awards, rights to payment of every kind, and other forms of obligations, instruments, and other property that at any time constitute any part of or are included in the proceeds of any of the foregoing (collectively, the "Collateral").

The Issuer agrees that the foregoing Grants are intended to grant in favor of the Indenture Trustee, for the respective benefit of the Secured Parties, a first priority, continuing lien and security interest in all of the Issuer's personal property. The Issuer authorizes the Indenture Trustee to file one or more financing statements describing the collateral as "all personal property" or "all assets" of the Issuer.

These Grants are made in trust to secure the payment of principal and interest on, and any other amounts owing on, the Notes, without prejudice, priority, or distinction (except as specifically provided in this Indenture), and to secure compliance with the provisions of this Indenture, all as provided in this Indenture.

The Indenture Trustee, as Indenture Trustee on behalf of the Secured Parties, acknowledges the Grants, accepts the trusts under this Indenture in accordance with this Indenture, and agrees to perform its duties required in this Indenture in accordance with its terms and the terms of the Transaction Documents.

ARTICLE I

DEFINITIONS AND OTHER PROVISIONS OF GENERAL APPLICATION

Section 1.01. Definitions.

Unless the context requires a different meaning, capitalized terms are used in this Indenture as defined in Annex 1 or the Adoption Annex.

Section 1.02. Incorporation by Reference of Trust Indenture Act.

Whenever this Indenture refers to a provision of the TIA, the provision is incorporated by reference into this Indenture. The following TIA terms used in this Indenture have the following meanings:

"Commission" means the Securities and Exchange Commission.

"indenture securities" means the Notes.

"indenture security holder" means a Noteholder.

"indenture to be qualified" means this Indenture.

"indenture trustee" or "institutional trustee" means the Indenture Trustee.

"obligor" on the indenture securities means the Issuer and any other obligor on the indenture securities.

All other TIA terms used in this Indenture that are defined in the TIA, defined by TIA reference to another statute, or defined by Commission rule have the meanings so assigned to them.

Section 11.09. Successors and Assigns.

All agreements in this Indenture and the Notes by the Issuer shall bind its successors and assigns, whether so expressed or not. All agreements of the Indenture Trustee in this Indenture shall bind its successors, assigns, co-trustees, and agents.

Section 11.10. Separability.

If any provision in this Indenture or in the Notes is invalid, illegal, or unenforceable, the validity, legality, and enforceability of the remaining provisions of this Indenture and the Notes shall not be affected in any way.

Section 11.11. Benefits of Indenture.

Nothing in this Indenture or in the Notes, express or implied, shall give to any person, other than the parties to this Indenture and their successors under this Indenture, the Master Servicer (under Article VIII), any person with an ownership interest in the Trust, and the Noteholders, any benefit or any legal or equitable right under this Indenture.

Section 11.12. Legal Holidays.

If the date on which any payment is due is not a Business Day, then (notwithstanding any other provision of the Notes or this Indenture) payment need not be made on that date, but may be made on the next Business Day with the same force as if made on the date on which nominally due, and no interest shall accrue for the period after the nominal due date.

Section 11.13. Governing Law.

THIS INDENTURE SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK, WITHOUT REFERENCE TO ITS PROVISIONS THAT WOULD RESULT IN THE APPLICATION OF THE LAWS OF ANOTHER STATE.

Section 11.14. Counterparts; Electronic Delivery.

This Indenture may be executed in any number of counterparts, each of which so executed shall be considered an original, but all the counterparts shall together constitute a single instrument. Any signature page to this Indenture containing a manual signature may be delivered by facsimile transmission or other electronic communication device capable of transmitting or creating a printable written record, and when so delivered shall have the effect of delivery of an original manually signed signature page.

Section 11.15. Recording of Indenture.

This Indenture is a Security Agreement under the UCC. If this Indenture is subject to recording in any appropriate public recording offices, the recording is to be effected by the Issuer but only at the request and expense of Noteholders accompanied by an Opinion of Counsel (which may be counsel to the Indenture Trustee or any other counsel reasonably acceptable to the Indenture Trustee) to the effect that the recording materially and beneficially affects the interests of the Noteholders or any other person secured under this Indenture or the enforcement of any right granted to the Indenture Trustee under this Indenture.

IN WITNESS WHEREOF, the parties to this Indenture have caused this Indenture to be duly executed by their officers, thereunto duly authorized, all as of the day and year first above written.

CWHEQ REVOLVING HOME EQUITY LOAN TRUST, SERIES 2006-A

By: WILMINGTON TRUST COMPANY,
not in its individual capacity,
but solely as Owner Trustee

By: /s/ Michelle C. Harra

Name: Michelle C. Harra
Title: Financial Services Officer

JPMORGAN CHASE BANK, N.A.
Indenture Trustee,

By: /s/ Keith R. Richardson

Name: Keith R. Richardson
Title: Attorney-In-Fact

CHASE BANK USA, NATIONAL ASSOCIATION
Co-Trustee

By: /s/ Diane P. Ledger

Name: Diane P. Ledger
Title: Assistant Vice President

EXECUTION COPY

CWHEQ REVOLVING HOME EQUITY LOAN TRUST,
SERIES 2007-G
Issuer

and

THE BANK OF NEW YORK
Indenture Trustee

_____

INDENTURE

Dated as of August 15, 2007

_____

THIS INDENTURE, dated as of August 15, 2007, between CWHEQ Revolving Home Equity Loan Trust, Series 2007-G, a Delaware statutory trust and the INDENTURE TRUSTEE, as indenture trustee,

WITNESSETH THAT

Each party agrees for the benefit of the other party and for the benefit of the Secured Parties as follows.

GRANTING CLAUSE

The Issuer Grants to the Indenture Trustee for the Classes of Notes and series referred to in the Master Glossary of Defined Terms as of the Closing Date, as Indenture Trustee for the benefit of the relevant Secured Parties, all of the Issuer's interest existing now or in the future in:

- the Mortgage Loans including their Asset Balances (including all Additional Balances) and the Mortgage Files and all property that secures the Mortgage Loans and all property that is acquired by foreclosure or deed in lieu of foreclosure, and all collections received on each Mortgage Loan after the Cut-off Date (excluding payments due by the Cut-off Date);

- the Issuer's rights under hazard insurance policies related to the Mortgage Loans;

- the interest of the Issuer in the Sale and Servicing Agreement and the Purchase Agreement (including the Issuer's right to cause the Mortgage Loans to be repurchased);

- all rights under any guaranty executed in connection with the Mortgage Loans ;

- the Collection Account and the Payment Account maintained to hold collections related to the Mortgage Loans and their contents; and

- all present and future claims, demands, causes of action, and choses in action regarding any of the foregoing and all payments on and all proceeds from any of the foregoing, including all proceeds of their conversion, voluntary or involuntary, into cash or other liquid property, all cash proceeds, accounts, notes, drafts, acceptances, chattel paper, checks, deposit accounts, insurance proceeds, condemnation awards, rights to payment of every kind, and other forms of obligations, instruments, and other property that at any time constitute any part of or are included in the proceeds of any of the foregoing (collectively, the "***Collateral***").

The Issuer agrees that the foregoing Grants are intended to grant in favor of the Indenture Trustee, for the respective benefit of the Secured Parties, a first priority, continuing

lien and security interest in all of the Issuer's personal property. The Issuer authorizes the Indenture Trustee to file one or more financing statements describing the collateral as "all personal property" or "all assets" of the Issuer.

These Grants are made in trust to secure the payment of principal and interest on, and any other amounts owing on, the Notes, without prejudice, priority, or distinction (except as specifically provided in this Indenture), and to secure compliance with the provisions of this Indenture, all as provided in this Indenture.

The Indenture Trustee, as Indenture Trustee on behalf of the Secured Parties, acknowledges the Grants, accepts the trusts under this Indenture in accordance with this Indenture, and agrees to perform its duties required in this Indenture in accordance with its terms and the terms of the Transaction Documents.

ARTICLE I

DEFINITIONS AND OTHER PROVISIONS OF GENERAL APPLICATION

Section 1.01. ***Definitions.***

Unless the context requires a different meaning, capitalized terms are used in this Indenture as defined in Master Glossary of Defined Terms attached as Annex 1.

Section 1.02. ***Incorporation by Reference of Trust Indenture Act.***

Whenever this Indenture refers to a provision of the TIA, the provision is incorporated by reference into this Indenture. The following TIA terms used in this Indenture have the following meanings:

"***Commission***" means the Securities and Exchange Commission.

"***indenture securities***" means the Notes.

"***indenture security holder***" means a Noteholder.

"***indenture to be qualified***" means this Indenture.

"***indenture trustee***" or "***institutional trustee***" means the Indenture Trustee.

"***obligor***" on the indenture securities means the Issuer and any other obligor on the indenture securities.

All other TIA terms used in this Indenture that are defined in the TIA, defined by TIA reference to another statute, or defined by Commission rule have the meanings so assigned to them.

agreement and the Indenture Trustee will cause payments to be made and notices to be given in accordance with them.

Section 11.07. ***Conflict with Trust Indenture Act.***

If any provision of this Indenture limits, qualifies, or conflicts with another provision of this Indenture that is required to be included in this Indenture by the Trust Indenture Act, the required provision shall control.

The provisions of TIA Sections 310 through 317 that impose duties on any person (including the provisions automatically included in this Indenture unless expressly excluded by this Indenture) are a part of and govern this Indenture, whether or not physically in this Indenture.

Section 11.08. ***Effect of Headings and Table of Contents.***

The Article and Section headings and the Table of Contents are for convenience only and shall not affect the construction of this Indenture.

Section 11.09. ***Successors and Assigns.***

All agreements in this Indenture and the Notes by the Issuer shall bind its successors and assigns, whether so expressed or not. All agreements of the Indenture Trustee in this Indenture shall bind its successors, assigns, co-trustees, and agents.

Section 11.10. ***Separability.***

If any provision in this Indenture or in the Notes is invalid, illegal, or unenforceable, the validity, legality, and enforceability of the remaining provisions of this Indenture and the Notes shall not be affected in any way.

Section 11.11. ***Benefits of Indenture.***

Nothing in this Indenture or in the Notes, express or implied, shall give to any person, other than the parties to this Indenture and their successors under this Indenture, the Master Servicer (under Article VIII), any person with an ownership interest in the Trust, and the Noteholders, any benefit or any legal or equitable right under this Indenture.

Section 11.12. ***Legal Holidays.***

If the date on which any payment is due is not a Business Day, then (notwithstanding any other provision of the Notes or this Indenture) payment need not be made on that date, but may be made on the next Business Day with the same force as if made on the date on which nominally due, and no interest shall accrue for the period after the nominal due date.

Section 11.13. ***Governing Law.***

THIS INDENTURE SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK, WITHOUT REFERENCE TO ITS PROVISIONS THAT WOULD RESULT IN THE APPLICATION OF THE LAWS OF ANOTHER STATE.

IN WITNESS WHEREOF, the parties to this Indenture have caused this Indenture to be duly executed by their officers, thereunto duly authorized, all as of the day and year first above written.

CWHEQ REVOLVING HOME EQUITY LOAN TRUST, SERIES 2007-G

By: WILMINGTON TRUST COMPANY,
not in its individual capacity,
but solely as Owner Trustee

By: /s/ Patricia A. Evans `
Name: Patricia A. Evans
Title: Vice President

THE BANK OF NEW YORK
Indenture Trustee,

By: /s/ Matthew Sabino
Name: Matthew Sabino
Title: Assistant Treasurer

For Opinion See 2011 WL 6338898

Court of Appeals of New York.
ASSURED GUARANTY (UK) LTD., in its own right and in the right of Orkney Re II PLC, Plaintiff-Appellant,
v.
J.P. MORGAN INVESTMENT MANAGEMENT INC., Defendant-Respondent.
RONI LLC, et al., Plaintiffs-Respondents,
v.
Rachel L. ARFA, et al., Defendants-Appellants, Gadi Zamir, et al., Defendants.
No. 2011-0227.
July 14, 2011.

(N.Y. County Index No. 601224/07)
(N.Y. County Index No. 603755/08)
To be argued by: Richard Dearing
10 minutes requested

Brief for Amicus Curiae Attorney General of the State of New York

Barbara D. Underwood, Solicitor General, Richard Dearing, Deputy Solicitor General, Alison J. Nathan, Special Counsel to the Solicitor General of Counsel.Eric T. Schneiderman, Attorney General of the State of New York, Attorney for Amicus Curiae, 120 Broadway, New York, New York 10271, (212) 416-8020, (212) 416-8962 (facsimile).

***i** TABLE OF CONTENTS

***iii** TABLE OF AUTHORITIES

Cases

***vii** Miscellaneous Authorities

INTEREST OF THE ATTORNEY GENERAL AND PRELIMINARY STATEMENT

Two cases before the Court, *Assured Guaranty (UK) Ltd. v. J.P. Morgan Investment Management Inc. and Roni LLC v. Arfa*, present the question of whether General Business Law article 23-a, known as the Martin Act, preempts private common-law claims alleging conduct in securities transactions that could also be the subject of an enforcement action brought by the Attorney General under the Act. The Attorney General submits this brief amicus curiae to explain that the Martin Act has no such preemptive effect.[FN1]

> FN1. For the convenience of the Court, the Attorney General is submitting a combined brief amicus curiae in both cases. All arguments are equally applicable to both cases, with the exception of the final section, infra Part IV, which makes arguments applicable only to Roni.
>
> Page numbers preceded by "RR" refer to pages in the appellants' Record on Appeal in Roni; numbers preceded by "AGR" refer to the appellants' Record on Appeal in *Assured Guaranty;* and numbers preceded by "AGA" refer to the appellants' Appendix in Assured Guaranty.

In *Assured Guaranty*, the First Department correctly held that the Martin Act, which is enforceable exclusively by the Attorney General, does not preempt independent private common-law tort claims. In Roni, which was issued before *Assured Guaranty*, the First Department rejected the asserted defense of Martin Act preemption by ruling that any such defense must fail because (in the court's erroneous view) the challenged transactions were beyond the scope of the Martin Act; the court did not reach the question whether the Martin Act would preempt claims that fall within the scope of the statute. Each of the other departments of the Appellate Division to have addressed the matter has, like the First Department in *Assured Guaranty*, rejected Martin Act preemption.

Nevertheless, some state trial courts and various federal courts, nearly all of them acting before the Assured Guaranty decision, have erroneously concluded that the Martin Act preempts most private actions alleging deceptive or otherwise tortious conduct in the sale of securities (common-law fraud excepted), if that conduct could be the subject of an enforcement action by the Attorney General under the Martin Act. The Attorney General has a strong interest in ensuring that the Martin Act is not accorded preemptive effect that the Legislature never intended. The Martin Act vested the Attorney General with public enforcement authority to combat securities fraud, but neither increased nor diminished the remedies available to private litigants in that area. There is no basis in the text or history of the Martin Act for finding any intent to preempt independent common-law actions. This Court has made clear that the common law is preserved absent unmistakable legislative intent to abrogate it. The Martin Act contains no indication at all, let alone a clear one, that the Legislature intended to abolish private common-law claims that exist independently of the

Martin Act.

Moreover, the policy argument most often advanced to support preemption is fundamentally misplaced. Defendants incorrectly argue that preemption is needed to protect the exclusive authority of the Attorney General to enforce the Martin Act. But private common-law actions brought under independent legal authority do not interfere with the Attorney General's enforcement of the Martin Act. In fact, such private actions for the most part advance, and do not hinder, the Attorney General's fundamental mission under the Martin Act: to eliminate fraudulent practices in the sale or purchase of securities across this State. The Attorney General cannot take sole responsibility for policing the securities marketplace for fraud and deceptive conduct. The cases are too numerous, and often have insufficient statewide significance, to warrant enforcement actions by the Attorney General in every case. And there is no indication that the Legislature intended the Attorney General to have exclusive enforcement authority in all cases of securities fraud. The preemption rule asserted by defendants here would reduce the protection afforded to investors and the securities markets, and would thus directly contravene the legislative goal embodied in the Martin Act.

Indeed, the Attorney General's enforcement authority under the Martin Act is threatened not by the existence of private common-law actions but rather by the defendants' proposed preemption rule. The defendants ask this Court to hold that certain private common-law claims are preempted if they somehow "mimic" claims under the Martin Act or are "covered by" the Act. Such a rule would make every preemption defense turn on a determination of the scope of the Martin Act; it would spawn private litigation about the extent of that authority, and it would create a strong incentive for plaintiffs to argue for a narrow interpretation of the Martin Act in order to avoid preemption of their private claims. As the Roni case demonstrates, questions about the scope of the Martin Act would be addressed in litigation where the Attorney General was not present, and courts might improperly narrow the scope of the Act in such cases without benefit of the Attorney General's views. Such a regime threatens the Attorney General's enforcement authority under the Martin Act far more seriously than a rule that recognizes the Martin Act and the common law as distinct and compatible sources of law, either or both of which may appropriately be invoked to redress fraudulent and deceptive conduct in securities transactions.

STATEMENT OF THE CASE

A. Overview of the Martin Act

The Martin Act authorizes the Attorney General to investigate whenever it appears that any person is, was, or will be engaged in "fraudulent practices" involving securities. General Business Law ("G.B.L.") §352(1).

The words 'fraud' and 'fraudulent practice' in this connection [are] given a wide meaning, so as to include all acts, although not originating in any actual evil design or contrivance to perpetrate fraud or injury upon others, which do by their tendency to deceive or mislead the purchasing public come within the purpose of the law.

People v. Federated Radio Corp., 244 N.Y. 33, 38-39 (1926).

If the Attorney General investigates conduct and concludes that a fraudulent practice has been, is being, or will be committed, he may bring a civil action for both equitable and legal remedies. G.B.L. §§ 352-i, 353. The Attorney General may also criminally prosecute any person who has engaged in a fraudulent practice in violation of the Martin Act. Id. § 352-c. In a civil claim under the Martin Act, the Attorney General need not prove traditional common-law fraud elements such as scienter or reliance. *See, e.g.*, *People v. Lexington Sixty-First Assocs.*, 38 N.Y.2d 588, 595 (1976); *State v. Sonifer Realty Corp.*, 212 A.D.2d 366, 367 (1st Dep't 1995).

The Martin Act does not require the registration of most securities before they are offered for sale. People v. Landes, 84 N.Y.2d 655, 660-61 (1994). Registration is, however, required in connection with sales of interests in real estate syndications, such as condominium ("condo") or co-operative ("co-op") housing.[FN2] The Martin Act provides that

before offering condo units or co-op shares for sale, the sponsor of such sales must first submit an offering plan to the Attorney General for review. See G.B.L. § 352-e(1). The offering plan must disclose numerous items listed in the statute, as well as additional information prescribed in extensive regulations promulgated by the Attorney General. See id. § 352-e(6)(a); 13 N.Y.C.R.R. pts. 16-25. The Attorney General's acceptance for filing of an offering plan does not constitute approval of the sale. G.B.L. § 352-e(4). The offering plan, as filed with the Attorney General, must be furnished to prospective purchasers. *Id.* § 352-e(5).

FN2. The Martin Act also requires registration of intrastate securities offerings. G.B.L. § 359-ff.

The Martin Act also contains limited registration requirements for investment advisers who are not required to register with the federal government. *See id.* § 359-eee; 13 N.Y.C.R.R. part 11.[FN3] Investment advisers subject to state registration must attain a passing grade on a specified examination, with some exceptions, and must annually renew their registration. 13 N.Y.C.R.R. §§ 11.4, 11.6. Those investment advisers must file with the Attorney General a copy of any promotional materials that they publish or broadly distribute and must maintain certain specified records for a period of five years. *Id.* §§ 11.9, 11.10. The Attorney General does not review or approve investment advisers' promotional materials before they are distributed or prescribe any required contents of such materials.

FN3. The Martin Act also generally requires securities dealers, brokers, and salesmen to file registration statements with the State. See G.B.L. § 359-e(2)-(3).

B. Assured Guaranty v. J.P. Morgan

1. The Assured Guaranty Complaint

Assured Guaranty filed an action against J.P. Morgan in Supreme Court, New York County, in December 2008 (Assured Guaranty Record on Appeal [“AGR”] 28), asserting common-law claims for breach of fiduciary duty, gross negligence, and breach of contract (AGR 50-53; 122-157).[FN4] J.P. Morgan moved to dismiss the amended complaint (AGR 169-170), arguing among other things that Assured Guaranty's tort claims were preempted by the Martin Act (AGR 198-200).

FN4. While the complaint was subsequently amended in certain respects, it continues to seek relief under the same three causes of action (AGR 122-157).

The gravamen of Assured Guaranty's action is the claim that J.P. Morgan mismanaged the investment portfolio of a debtor whose obligations plaintiff guaranteed.[FN5] The complaint alleges that Assured Guaranty was asked to act as financial guarantor for certain notes issued by a nonparty entity known as Orkney Re II PLC (“Orkney”) (AGR 128-32). Because Orkney's ability to pay interest on the notes depended heavily upon maintaining the value of its invested assets (AGR 131), Assured Guaranty participated in the selection of an investment advisor for Orkney, and when JP Morgan was selected, Orkney was expressly made a third-party beneficiary of Orkney's contract with J.P. Morgan (AGR 132-135). Relying on JP Morgan's competence as an investment advisor, Assured Guaranty agreed to issue the financial guaranty for Orkney's notes (AGR 136).

FN5. The allegations below are drawn from the amended complaint, which is assumed to be true for the purpose of defendants' motion to dismiss. *See, e.g.*, *Depetris & Bachrach, LLP v. Srour*, 71 A.D.3d 460, 461 (1st Dep't 2010).

J.P. Morgan was advised that Orkneys investment goal was to earn reasonable income while protecting capital, and that Orkney needed a diversified portfolio (AGR 133-136). Nonetheless, J.P. Morgan invested Orkney's assets heavily in risky securities, particularly those based upon subprime and “Alt-A” residential real estate loans. J.P. Morgan failed to diversify Orkney's portfolio, or advise Orkney of the true level of risk, even after J.P. Morgan concluded that it did

not desire to hold these same risky securities in its own portfolio. (AGR 139-142, 144-147). In addition, J.P. Morgan made investment decisions for the good of Scottish Re, which retained a residual interest in Orkney's assets, rather than for the benefit of Orkney and Assured Guaranty (AGR 143-144). As a result of J.P. Morgan's actions, Orkney's assets decreased substantially (AGR 147-148). Despite Orkney's and Assured Guaranty's efforts to mitigate the losses, Orkney has had insufficient cash to make all note payments and Assured Guaranty has been obligated to begin making payments under its guarantee (AGR 148-151).

2. The Rulings on Martin Act Preemption in Assured Guaranty

By Order entered January 29, 2010, Supreme Court (Kapnick, J.), dismissed the complaint in its entirety (AGR 9-26). The court ruled that the tort claims were preempted by the Martin Act (AGR 17-20), reasoning that "the claims for breach of fiduciary duty and gross negligence fall within the purview of the Martin Act and their prosecution by plaintiff would be inconsistent with the Attorney General's exclusive enforcement powers under the Act." (AGR 20 (footnote omitted)). The court also dismissed the contract claim on the merits (AGR 21-26).

The Appellate Division, First Department reversed, reinstating the breach of fiduciary duty and gross negligence claims.[FN6] In an opinion issued on November 23, 2010, the First Department concluded that "there is nothing in the plain language of the Martin Act, its legislative history or appellate level decisions in this State that supports defendant's argument that the act preempts otherwise validly pleaded common-law causes of action." (Assured Guaranty Appendix ["AGA"] 140).

> FN6. The Attorney General's Office filed a brief amicus curiae urging the First Department to reject the defendants' assertion of Martin Act preemption.

The First Department distinguished between the questions whether (1) the Martin Act itself *creates* a private right of action, and (2) the Martin Act affirmatively *preempts* independent private common-law claims. The court held that "here is no question that a private action cannot be maintained based upon the provisions of the Martin Act," citing this Court's decisions in *CPC International Inc. v. Mckesson Corp.*, 70 N.Y.2d 268 (1987), and *Kerusa Co. LLC v. W10Z/515 Real Estate L.P.*, 12 N.Y.3d 236 (2009). (AGA 133-134). But the court explained that the absence of a private right of action under the Martin Act "does not automatically mean that the statute preempts common-law causes of action." (AGA 134). The court then correctly rejected preemption of independent common-law claims.

The First Department further explained that earlier appellate division decisions dismissing common-law claims were merely enforcing the rule that the Martin Act does not itself create a private right of action, in order to prevent circumvention of that rule through artful pleading. Thus, "where a pleading is drafted in such a way as to cast what is clearly an obligation under the Martin Act as a common-law cause of action, that complaint would constitute, in effect, a prohibited private action based upon the provisions of the Martin Act." (AGA 135). This sometimes occurs in cases involving condo or co-op interests, where plaintiffs occasionally bring common-law claims alleging that sponsors failed to comply with the Martin Act requirement to submit an offering plan that meets detailed disclosure obligations prescribed in the statute and the Attorney General's implementing regulations. Such a claim is not permitted to proceed, the First Department observed, because it would simply circumvent the rule that the Martin Act does not create private-rights of action. (AGA 135). If, however, a complaint alleges a common-law claim that does "not rely entirely on alleged omissions from filing required by the Martin Act and the Attorney General's implementing regulations," such an action, the First Department held, is not preempted by the Martin Act and may proceed in private litigation. (AGA 135-136 (quotation omitted)).

The First Department recognized that some federal courts have reached a contrary conclusion and have held that, except for fraud, the Martin Act preempts any private common-law causes of action that are "covered by" the Martin Act. (AGA 136-138). Relying on the extensive discussion of this issue by Judge Marrero in *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372 (S.D.N.Y. 2010), however, the First Department concluded that these cases

finding preemption erroneously "blur the lines" between the two distinct kinds of cases discussed above, and ignore the distinction between common-law claims that in substance allege *violations* of the Martin Act and such claims that merely allege conduct that is covered by the Martin Act. (AGA at 133).

"When 'violation of' swelled to 'covered by,' the specific became the general." The result was a significant expansion of the rule of the state courts 'which had only dismissed claims relying solely on real estate regulations promulgated by the Attorney General under the Martin Act and had never preempted any causes of action that existed independent of the Martin Act.

(AGA 138 (quoting *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 354 (S.D.N.Y. 2010)). The First Department explained that the federal courts that have erroneously reached a rule of Martin Act preemption, did so based on misplaced reliance on a handful of state court decisions "which, when carefully read in context with the legislative history of the Martin Act, do not address the issue of preemption vis-a-vis common-law rights of action." (AGA 138). Moreover, the First Department observed that state courts are "moving in the opposite direction from their federal brethren on the issue of preemption." (AGA 138).

Agreeing with the state and federal courts that have rejected preemption as inconsistent with the text, purpose, and structure of the Martin Act, the First Department reinstated Assured Guaranty's claims for breach of fiduciary duty and gross negligence.

By order dated February 17, 2011, the First Department granted the defendants leave to appeal to this Court. (AGA 147-148).

C. Roni v. Arfa

1. The Roni Complaint

The complaint in *Roni* alleges that plaintiffs or their assignors, all domestic LLCs authorized to do business in New York, invested in seven LLCs (the "Property LLCs") that each in turn purchased and managed one or more apartment buildings in Harlem or the Bronx *(Roni* Record ["RR"] 52-59, 63). Plaintiffs allege that the promoters of the Property LLCs received undisclosed kickbacks from third parties, to the detriment of the investors.

The amended complaint alleges that defendants Rachel Arfa, Alexander Shpigel, and Gadi Zamir, all residents of New York City, organized and promoted these real estate transactions individually or through companies they controlled.[FN7] They selected the properties, arranged financing, organized the Property LLCs, solicited investors, and managed the properties. (RR 59-61, 63-65).

> FN7. Other named defendants served as counsel to the promoters and the Property LLCs (RR 61-63, 65, 68). These defendants were dismissed in a ruling not at issue in this appeal. *See Roni LLC v. Arfa*, Index No. 601224/07 (Sup. Ct., N.Y. County Apr. 15, 2009), adhered to on reargument and renewal (Sup. Ct. N.Y. County Oct. 27, 2009), *aff'd* 72 A.D.3d 413 (1st Dep't), *aff'd* 15 N.Y.3d 826 (2010).

The amended complaint further alleges that the promoter defendants made misrepresentations and failed to disclose material facts in oral statements and written promotional materials. Specifically, according to the complaint, the promoters represented that they would be compensated through (1) receipt of "acquisition fees" for their services in identifying and acquiring the properties; (2) receipt of a percentage of the rents for managing the buildings; (3) sale of maintenance and renovation services to the buildings; and (4) possession of equity stakes in the Property LLCs. The promoters did not disclose, however, that they were also receiving brokerage commissions from the people or companies who sold the apartment buildings to the Property LLCs. These commissions artificially inflated the purchase prices paid by the Property LLCs, enriching the promoters at the investors' expense. (RR 66-89).

2. The Rulings on Martin Act Preemption in Roni

By memorandum decision entered April 17, 2009, Supreme Court denied the defendants' motions to dismiss as preempted by the investors' claims for common-law breach of fiduciary duty, constructive fraud, and accounting (RR 22-44).[FN8] Supreme Court rejected their claim of preemption here on two grounds: first, that the transactions are beyond the scope of the Martin Act because they were neither "public offerings" nor made "within or from New York" (RR 30); and second, that the claims "do not encroach upon the legislative scheme underlying the Martin Act" because they do not "implicate the offering-plan [disclosure] requirements con-tained in the Martin Act" (RR 33). On the merits, the court held that plaintiffs had adequately pleaded common law claims for breach of fiduciary duty, constructive fraud, and accounting. (RR 33-39).

> FN8. This brief does not address the rulings below on issues unrelated to preemption. Thus, we do not address the defendants' claim that the plaintiffs did not adequately plead fraud damages. Nor is there any occasion to address other rulings of Supreme court, not challenged by any party to this appeal, including the dismissal of all claims against certain entities allegedly controlled by the attorney defendants (RR 42-43); the claim for waste against the promoters (RR 39); and the claim for actual fraud, dismissed with leave to replead (RR 39-40).

The First Department affirmed in a decision issued June 3, 2010 (several months before the Appellate Division decision in *Assured Guaranty*) (RR 3-9).[FN9] The court did not rule on the validity of the defendants' general theory of Martin Act preemp-tion, but instead held that the preemption defense failed on its own terms, because the transactions at issue were not "public offerings" regulated by the Martin Act at all (RR 5). The court also held that the claims were otherwise well-pleaded (RR 5-9).

> FN9. The Attorney General's Office did not participate as amicus curiae.

By order entered September 23, 2010, the First Department certified its decision in Roni for review by this Court (RR 12).

ARGUMENT

POINT I THE MARTIN ACT DOES NOT PREEMPT INDEPENDENT COMMON-LAW CAUSES OF ACTION IN THE AREA OF SECURITIES

Preemption is a matter of legislative intent. Nothing in the text or history of the Martin Act suggests that the Legislature intended to preempt private common-law causes of action in the area of securities. To the contrary, the Martin Act was intended to supplement existing causes of action and to expand the Attorney General's enforcement authority.

"Although it is within the competence of the Legislature to abolish common-law causes of action," this Court looks for an "express provision to that effect in the statute." *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 331 (1983); *see also Hechter v. N.Y. Life Ins. Co.*, 46 N.Y.2d 34, 39 (1978) ("[A] clear and specific legislative intent is requierd to override the common law."); ***21***ABN AMRO Bank, N.V. v. MBIA Inc.*, 2011 N.Y. Slip Op. 05542, at *8 (N.Y. June 28, 2011) (stating that if the Legislature intended to extinguish existing causes of action "we would expect to see evidence of such intent within the statute"). Accordingly, this Court requires a "clear [] indication of legislative intent" before holding a "statute pre-emptive of all common-law causes of action." *Burns Jackson*, 59 N.Y.2d at 331.

As this Court recognized in *Burns Jackson*, "when the common law gives a remedy, and another remedy is provided by statute, the latter is cumulative, unless made exclusive by the statute." *Id.* (quotation marks omitted). This question whether a statutory remedy abrogates existing common-law remedies is sharply distinct from the question whether the

statute itself creates implied private rights of action beyond the express remedy it sets forth. Thus, in *Burns Jackson*, when the Legislature authorized the Attorney General or other appropriate legal officer to enforce a statutory ban on strikes by public employees, this Court held that the legislation neither created an implied private statutory right of action nor preempted existing private common-law remedies. *Id.* at 324-32.

***22** So too here: the Martin Act creates no private right of action, but also does not preempt common-law remedies whose source is independent of the statute. In *CPC International, Inc. v. McKesson Corp.*, this Court held that there is no implied private right of action to enforce the Martin Act, resolving a division of authority among lower state and federal courts. 70 N.Y.2d at 275-77. But *CPC International* did not suggest that the Martin Act preempts common-law remedies. To the contrary, CPC International reinstated the plaintiff's common-law fraud claim against its investment banker. *Id.* at 284-85. And in *Kerusa Co. v. W10Z/ 515 Real Estate L.P.*, this Court explained that the common-law claim in *CPC International* was permitted to go forward because it was "an independent common-law tort" that "did not turn on" alleged noncompliance with the Martin Act or its implementing regulations. 12 N.Y.3d 236, 246, 247.

As did the First Department here (AGA 122-146), the appellate courts of this State have uniformly held that nothing in the Martin Act suggests any intent whatever to preempt private common-law causes of action, let alone the clear intent required to ***23** overcome the presumption against abrogation of common-law remedies. *See Bd. of Managers of Marke Gardens Condo. v. 240/242 Franklin Ave., LLC, 71 A.D.3d 935, 936 (2d Dep't 2010); Scalp & Blade, Inc. v. Advest, Inc.*, 281 A.D.2d 882, 883 (4th Dep't 2001). The text of the Martin Act does not address private common-law claims. Instead, it vests the Attorney General with powers to investigate and prosecute fraudulent practices involving securities.[FN10]

> FN10. Even if a regulatory regime could, in some circumstances, be so comprehensive as to foreclose inconsistent common-law claims without an explicit statement, the Martin Act is not, and does not purport to be, such a regime. This Court has recognized as much by holding that the Martin Act's detailed and extensive regulation of condo and co-op interests does not preempt common-law claims that allege wrongs apart from noncompliance with the Martin Act itself. *Richards v. Kaskel*, 32 N.Y.2d 524, 535 n.5 (1973). As this Court recently explained: "Given the limited scope of the Attorney General's adjudicatory authority under [§ 352-e] of the General Business Law, we concluded [in *Richards*] that the Legislature did not 'intend [] to deprive the court of its traditional equitable jurisdiction to consider claims of illegality on the part of the sponsor apart from noncompliance with that provision.'" *ABN AMRO Bank*, 2011 N.Y. Slip Op. 05542, at *7-*8 (quoting Richards, 32 N.Y.2d at 535 n.5). Because there is no implied preemption of common-law claims regarding condo and co-op interests, where the Martin Act regulatory scheme is most extensive, there can be no implied preemption a fortiori for other securities interests, which are subject to less extensive prescriptions under the Martin Act. J.P. Morgan's suggestion (Br. at 23-24) that investment advisers are subject to a regulatory registration regime comparable to the condo and co-op offering-plan regime is irrelevant, as well as inaccurate. See *supra*, at 7-8.

***24** Nor have the defendants identified anything in the statute's legislative history that indicates an intent to preempt common-law claims. To the contrary, the history of the Martin Act refutes any suggestion that the statute was meant to supplant private common-law remedies. As originally enacted in 1921, the Martin Act conferred limited remedial powers on the Attorney General, authorizing the Attorney General only to restrain imminent fraud, not to redress frauds already completed. See Act of May 7, 1921, ch. 649, 1921 N.Y. Laws 1989, 1991. It would of course be utterly implausible to suppose that a statute authorizing the Attorney General to seek to enjoin imminent fraud preempted private actions seeking restitution or any other form of retrospective relief.

From time to time the Legislature has provided the Attorney General with additional enforcement powers, but it has never displayed any intention to displace private common law actions. Thus, in 1923, the Legislature gave the Attorney General the ***25** power to seek injunctions restraining parties from continuing or repeating past frauds. Act of May 22, 1923, ch. 600, 1923 N.Y. Laws 899, 900, 902. Two years later the Legislature gave the Attorney General the power to seek receiverships. Act of Apr. 1, 1925, ch. 239, 1925 N.Y. Laws 485, 487. In 1955 the Legislature au-

thorized the Attorney General enforce the Martin Act through criminal prosecutions, G.B.L. § 352-c, in 1955. Act of Apr. 21, 1955, ch. 553, 1955 N.Y. Laws 1255, 1257.

Only in 1976 did the Legislature codify the Attorney General's power to seek restitution for injured investors. See Act of July 20, 1976, ch. 559, 1976 N.Y. Laws (n.p.); Memo. for the Governor from Louis J. Lefkowitz, Attorney. General (July 9, 1976), *reprinted in* Bill Jacket for ch. 559, *supra.* At that time, the Office of Court Administration commented that the power for the Attorney General to seek restitution benefited "small investors who can not afford to maintain individual actions," thereby implicitly recognizing that private actions remained available to those who could afford them. See Letter from Michael R. Juviler, Office of Court Administration, to Judah Gribetz, Counsel to the ***26** Governor (July 15, 1976), *reprinted in* Bill Jacket for ch. 559 (1976). Defendants have not identified exactly when, and by what enactment, they believe the Legislature preempted private common-law remedies, nor could they plausibly do so.

Finally, this Court should reject J.P. Morgan's novel invocation of the doctrine of legislative acquiescence. See J.P. Morgan Br. at 39-40. First, there can be no argument that the Legislature has somehow silently acquiesced to a "final judicial determination," *Brooklyn Union Gas Co. v. New York State Human Rights Appeal Bd.*, 41 N.Y.2d 84, 90 (1976), that the Martin Act preempts the common law, because there has been no such judicial determination. This Court has not expressly ruled on the question of Martin Act preemption and the appellate courts of this State have uniformly held that the Martin Act does not preempt private common-law causes of action. As a result, the claim of legislative acquiescence lacks the necessary foundation. *See Id.* at 90 (stating that acquiescence is only potentially available if legislative inactivity follows the announcement of a Court of Appeals determination).

***27** In any event, consideration of legislative acquiescence simply has no role in the context of preemption of the common law, since, as discussed above, this Court requires a clear indication of legislative intent before concluding that a statute preempts the common law. Legislative inaction, far from being a clear indication, "because of its inherent ambiguity, 'affords the most dubious foundation for drawing positive inferences."' Clark v. Cuomo, 66 N.Y.2d 185, 190-91 (1985) (citations omitted).

Accordingly, J.P. Morgan misses the mark in suggesting that the Legislature has "acquiesced" in the face of some federal and state trial court decisions that have mistakenly found preemption, discussed *infra*, and has not "amended the Act to resurrect non-fraud tort claims by private plaintiffs." J.P. Morgan Br. at 40. There has been no occasion for the legislature to "resurrect" common-law remedies because they were never abolished in the first place. In the absence of a clear legislative intent to "abolish common-law causes of action," *Burns Jackson*, 59 N.Y.2d at 331, no such preemption either already did or may now occur.

***28** In sum, as the First Department in Assured Guaranty correctly concluded, "there is nothing in the plain language of the Martin Act, its legislative history or appellate level decisions in this State that supports [the defendants'] argument that the act preempts otherwise validly pleaded common-law causes of action." (AGA 140).

POINT II THERE IS NO BASIS FOR DISTINGUISHING BETWEEN COMMON-LAW ACTIONS THAT REQUIRE SCIENTER AND THOSE THAT DO NOT FOR PURPOSES OF PREEMPTION

In CPC International this Court established that common-law fraud claims are not preempted by the Martin Act. 70 N.Y.2d at 284-85. Thereafter, several federal decisions, bound to acknowledge that common-law fraud claims are not preempted, nonetheless held that other common-law claims that do not require proof of scienter are preempted. The defendants here advocate the same position. The theory seems to be that non-scienter-based claims are the special province of the Martin Act, and private claims of that nature are barred because they ***29** "essentially mimic the Martin Act," whereas common-law fraud claims "require an additional element" beyond what the Attorney General must prove under the Martin Act, and are therefore not barred. *Nanopierce Techs., Inc. v. Southridge Capital Mgmt.*, No. 02 CV 0767, 2003 WL 22052894, at *4 (S.D.N.Y. Sept. 2, 2003); see also JP Morgan Brief at 11.

This theory, however, misconstrues New York law, including decisions of this Court, and mischaracterizes the nature of non-scienter-based common-law claims.

A. This Court's Decisions Draw No Distinction Between Scienter and Non-Scienter Based Claims

The federal court decisions finding preemption of non-scienter-based claims have misapplied state court decisions, failing to understand the limits of those decisions and their legal context. This mistake, "perpetuated from opinion to opinion with little second-guessing," has spawned a line of federal cases embracing Martin Act preemption that does not square with New York law. *Anwar*, 728 F. Supp. 2d at 371.

***30** As shown below, the state court decisions often cited by the federal courts and cited by the defendants here do not actually involve preemption of independent common-law claims by the Martin Act, and do not draw any distinction between scienter-based and non-scienter-based claims. See, e.g., Kerusa, 12 N.Y.3d 236; *Whitehall Tenants Corp. v. Estate of Olnick*, 213 A.D.2d 200 (1st Dep't 1995); *Horn v. 440 E. 57th Co.*, 151 A.D.2d 112 (1st Dep't 1989) (all cited by the parties in these appeals). Instead, the state decisions hold that, regardless of whether scienter is alleged, a plaintiff cannot bring a common-law cause of action that affirmatively relies on disclosure obligations imposed by the Martin Act or its implementing regulations to establish one or more elements of the claim. If a common-law claim effectively alleges noncompliance with Martin Act disclosure obligations, the claim is not independent of the statue, but instead constitutes a private attempt to enforce the Martin Act, which this Court forbade in CPC International. (See e.g. AGA 135 (stating that state court decisions, including the First Department's earlier decision in *Horn v. 44 E. 57th Co.*, "neither held nor implied that ***31** the Martin Act preempts properly pleaded common-law causes of action")).

Private plaintiffs have on occasion tried to assert such claims in certain cases involving public offerings of condo or co-op interests, where the Martin Act requires submission of an offering plan to the Attorney General. For example, in *Kerusa*, this Court held that a claim pleading the elements of common-law fraud - including scienter - was a prohibited "backdoor private cause of action to enforce the Martin Act" because "the fraud [was] predicated solely on alleged material omissions from the offering amendments mandated by the Martin Act and the Attorney General's implementing regulations." 12 N.Y.3d at 239, 245 (citation omitted); *see also Eagle Tenants Corp. v. Fishbein*, 182 A.D.2d 610, 611 (2d Dep't 1992) (rejecting cause of action that "attempt[ed] to premise liability for wrongful omission of [certain information] from the offering plan based upon a fiduciary's duty to disclose"). In *Kerusa*, this Court made no distinction between scienter-based and non-scienter-based claims, and indeed ***32** dismissed a scienter-based fraud claim as an improper private attempt to enforce the Martin Act. [FN11]

> FN11. As a matter of terminology, such a claim is not "preempted" by the Martin Act, because preemption denotes the displacement of a legal rule that would exist in the absence of the preempting law. See supra pgs 20-21. Rather, the claim is better described as "invalid" because it is an improper attempt by artful pleading to circumvent the rule that there are no implied private rights of action enforceable under the Martin Act. In *Kerusa*, this Court did not use the terminology of preemption, but instead asked whether the plaintiffs common-law claim was "valid" or "sufficiently pleaded." 12 N.Y.3d at 245, 246. To be sure, some courts, including the First Department in Assured Guaranty, have erroneously described *Kerusa-type* claims as "preempted." (*See* AGA 135). The terminological imprecision of the First Department in that case cannot bear the weight that J.P. Morgan mistakenly attributes to it. Reply at Section I.A.

As *Kerusa* demonstrates, the relevant distinction between permissible and prohibited common-law claims is whether the common-law claim effectively attempts to enforce the Martin Act by alleging a violation of the Act under a common-law label or whether instead it states a claim that is independent of the Martin Act. Thus, on the one hand, claims that rely "entirely on alleged omissions from filings required by the Martin Act and the Attorney General's implementing regulations," 12 N.Y.3d at 247, must be dismissed under *CPC International* because they are ***33** "backdoor" attempts by private litigants to enforce the Martin Act. On the other hand, "independent common law tort

[s]," *Kerusa*, 12 N.Y.3d at 247, such as the common-law fraud claim allowed to proceed in *CPC International*, that do "not turn on alleged nondisclosure of information required by the Attorney General's Martin Act regulations," may go forward as valid pleadings, *id.* at 246.[FN12] See also Assured Guaranty, (AGA 134-135 (quoting Kerusa, 12 N.Y.3d at 245)); Bd. of Managers. of Marke Gardens, 71 A.D.3d at 936 (same). This, not the presence or absence of a scienter allegation, is the salient distinction that explains this Court's decisions in *CPC International and Kerusa.*

> FN12. In *Kerusa*, this Court reserved the question whether a private party could bring a common-law fraud claim alleging affirmative misrepresentations in an offering plan accepted for filing by the Attorney General. 12 N.Y.3d at 247 n.5. Such a claim should be allowed because it enforces an independent common-law duty: the duty not to induce a transaction by misrepresenting material facts. Indeed, if the sponsor were not required to file an offering plan, the sponsor might well have made the same misrepresentations in other forms to induce purchases of the offered interests. But whatever the answer to the question this Court left open in *Kerusa*, there is no basis to conclude that the Martin Act preempts a common-law claim that in no sense owes its existence to the Martin Act.

***34 B. The Distinction Between Scienter and Non-Scienter Claims Has No Relationship to Any Purpose that Might be Served By Martin Act Preemption.**

In addition to lacking any foundation in the decisions of this Court, the proposed distinction between claims that require scienter and those that do not lacks any other support. It rests on the notion that non-scienter-based private common-law claims somehow "mimic" claims under the Martin Act. But that notion is mistaken for at least two reasons.

First, the assertion that non-scienter-based claims "mimic" Martin Act claims wrongly suggests that the common-law claims are patterned after the Martin Act. But causes of action like breach of fiduciary duty and gross negligence have broad and deep roots at common law that are in no way derived from the Martin Act. *See, e.g.*, *Meinhard v. Salmon*, 249 N.Y. 458 (1928) (fiduciary duty); Colburn v. Morton, 1 Abb. Dec. 378, 36 How. Pr. 150 (N.Y. Ct. of App. 1867) (fiduciary duty); *Brewster v Hatch*, 122 N.Y. 349, 362 (1890) (promoters of a corporation occupy "a position of trust and confidence" towards investors); Batterson v. Raymond, 87 Misc. 229 (Sup. Ct. N.Y. County) (stockbroker has fiduciary duty ***35** to client), aff'd, 165 A.D. 954 (1st Dept. 1914); Weld v. Postal Telegraph Cable Co., 210 N.Y. 59 (1913) (gross negligence); *Rieser v. Metro. Express Co.*, 45 Misc. 632 (App. Term 1904) (gross negligence). Where well-recognized common-law causes of action exist entirely independently of the Martin Act, their assertion by a private plaintiff in a securities case cannot be described as a prohibited attempt to enforce the Martin Act itself. Any rule barring such claims would go beyond prohibiting private attempts to enforce the Martin Act and instead hold that the Martin Act affirmatively preempts independent claims with deep common-law roots. Nothing in the statute supports such a rule.

Second, the notion that non-scienter-based common-law claims "mimic" Martin Act claims is based on the mistaken premise that non-scienter claims and Martin Act claims share exactly the same elements. *See, e.g.*, *Nanopierce Techs., Inc.*, 2003 WL 22052894, at *4 (purporting to distinguish common-law fraud claims from non-scienter claims on the ground that fraud claims "require an additional element" beyond what is required in a Martin Act claim). On the contrary, just like common-law fraud ***36** claims, common-law private claims that do not require scienter include one or more elements that are not part of an action brought by the Attorney General under the Martin Act. For example, a private claim for breach of fiduciary duty requires, among other things, proof of the existence of a fiduciary relationship, *see* *Kurtzman v. Bergstol*, 40 A.D.3d 588, 590 (2d Dep't 2007), which is not an element of a Martin Act claim. Similarly, a private claim for gross negligence requires, among other things, proof of "'a reckless disregard for the rights of others, bordering on intentional wrongdoing,"' *Horwitz v. Camelot Assocs.*, 66 A.D.3d 1299, 1302 (3d Dep't 2009), which is not an element of a Martin Act claim. While Martin Act claims and non-scienter-based common-law claims may overlap to varying degrees, they are different in important respects.

This Court should reaffirm that the dividing line between permissible and prohibited common-law claims in this area

is not fraud or non-fraud; it is not whether scienter is alleged; and it is not, as the First Department arguably suggested in Assured ***37** Guaranty, whether the action involves real-estate or investment securities. Rather, the line is whether the common-law claim is stated independently of the Martin Act or instead attempts to enforce disclosure obligations that exist only as a result of the Martin Act.

In both *Assured Guaranty and Roni*, the plaintiffs' tort claims are entirely independent of the Martin Act and do not rely in any way on the existence of the statute. Accordingly, there can be no doubt that the claims should be decided on their merits, and are not preempted by the Martin Act. This result is consistent with relevant precedent from this Court, and appropriately recognizes and maintains the separation between the Martin Act and the common law as independent bodies of law. If the plaintiffs' complaints adequately plead claims for breach of fiduciary duty, gross negligence, or other torts under common-law principles (a question on which this brief takes no position), those claims should be sustained. If the complaints do not, the claims should be dismissed. The Martin Act has no relevance to that question.

38POINT III DEFENDANTS' POLICY ARGUMENT FOR PREEMPTION IS MISCONCEIVED

The courts that have mistakenly found Martin Act preemption have often contended that preemption is necessary in order to protect the exclusive authority of the Attorney General to enforce the Martin Act. Defendants advance the same argument here. Even if it were sound policy, this contention would not justify preemption absent a clear and specific indication of legislative intent to preempt. But in any event, defendants' policy argument is unsound for at least two reasons.

First, the purpose or design of the Martin Act is in no way impaired by private common-law claims that exist independently of the statute, since statutory actions by the Attorney General and private common-law actions both further the same goal, namely, combating fraud and deception in securities transactions. (See Assured Guaranty, AGA 137-138 [quoting from Amicus Brief of the Attorney General]); *see also* *Anwar*, 728 F. Supp. 2d 354. The existence of private common-law actions does not hamper the Attorney General's ability to enforce the Martin Act. Indeed, such ***39** private actions generally advance the Attorney General's fundamental mission under the Martin Act to eliminate fraudulent practices in the sale or purchase of securities across this State, because the Attorney General cannot possibly take sole responsibility for policing the securities marketplace for fraud. A rule of Martin Act preemption would leave the securities market under-protected, contrary to the core purpose of the Martin Act.

Second, far from protecting the Attorney General's exclusive enforcement authority under the Martin Act, the preemption argument urged by defendants instead threatens to undermine that authority. The defendants ask this Court to find that some common-law claims are preempted if they are "covered by" the Martin Act. But this rule would mean that private parties would raise and litigate questions about the scope and meaning of the Martin Act as a prerequisite to determining whether a particular common-law claim is "covered by" the Act. Consequently, "courts would address the scope of the Martin Act - and therefore effectively address the scope of the Attorney General's enforcement powers under that statute - in private litigation ***40** where the Attorney General was not a party and was not present.[FN13] And private plaintiffs would have a substantial incentive to seek a narrow interpretation of the Martin Act's scope, in order to avoid preemption of their private common law actions. This rule would be inconsistent with the purpose of the Martin Act, which "was to create a statutory mechanism in which the Attorney-General would have broad regulatory and remedial powers." CPC Int'l, 70 N.Y.2d at 277.

> FN13. There is much private litigation of which the Office of the Attorney General is unaware. But even to the extent that the Office might learn of private litigation raising Martin Act preemption and thus have the opportunity to participate as an amicus, significant resource-allocation decisions ought not be driven by private litigation.

Indeed, in private litigation, courts that have applied the preemption rule urged by defendants have engaged in broad

analysis about the scope of the Martin Act and have interpreted the Martin Act in ways that could undercut the Attorney General's enforcement powers. The Roni case here provides a classic example. As shown *infra* at Point IV, in Roni, Supreme Court and the Appellate Division rejected the preemption defense ***41** by holding, incorrectly, that the transactions at issue in that case were not subject to the Martin Act at all because they were not "public offerings" of securities. (RR 5). And Supreme Court also mistakenly held that the transactions were not within the territorial reach of the Martin Act because they were not made "within or from" New York. *Id.;* see G.B.L. § 352.

These conclusions, if allowed to stand, would threaten to narrow the Attorney General's enforcement power under the Martin Act. Rather than reaching such issues about the scope of the Martin Act in private litigation, the lower courts should have rejected Martin Act preemption at the threshold, and evaluated plaintiffs' common-law claims solely under common-law principles, thereby avoiding any need to address questions about the scope of the Martin Act in private litigation in which the Attorney General was not involved.

42POINT IV

THE LOWER COURTS IN RONI ERRONEOUSLY NARROWED THE SCOPE OF THE MARTIN ACT

This Court need not and should not reach any issue about the scope of the Martin Act or the Attorney General's authority thereunder in order to affirm the decisions below rejecting the defendants' assertions of Martin Act preemption. Nonetheless, the Court should vacate as unnecessary and erroneous the Roni courts' determination that the Martin Act does not apply to the transactions alleged in that case.

A. The Martin Act's Antifraud Provisions Are Not Limited to Public Offerings of Securities.

The Appellate Division held that the Roni transactions are not subject to the Martin Act because they did not involve a "public" offering of securities (RR 5). But this holding confuses (1) the detailed offering-plan regime for condo and co-op interests under § 352-e of the Martin Act and implementing regulations, with (2) the general antifraud provisions of §§ 352 and 352-c. While the offering-plan regime applies only to public offerings of real estate syndication interests, the antifraud provisions apply to ***43** all securities transactions, whether public or private and whether they involve real-estate syndications or other types of securities.

Section 352-e(1) requires the submission of an offering plan for acceptance by the Attorney General before any person makes or participates in a "public offering or sale in or from the State of New York" of real estate syndication interests. Consequently, private offerings of real estate syndication securities are not subject to the Martin Act's offering-plan regime. Indeed, all parties in *Roni* agree that there was not a "public offering" of real estate interests there, and therefore that defendants were not required to register the securities by filing an offering plan for acceptance by the Attorney General under G.B.L. § 352-e.

The Appellate Division wrongly held, however, that the absence of a public offering means that the *Roni* transactions were not subject to the general antifraud provisions of the Martin Act, such as G.B.L. §§ 352 and 352-c. By their express language, those sections are not limited to public offerings. Rather, they prohibit fraudulent or deceptive conduct "where engaged in to induce or promote the issuance, distribution, exchange, sale, negotiation or ***44** purchase within or from this state of any securities or commodities ..., regardless of whether issuance, distribution, exchange, sale, negotiation or purchase resulted." G.B.L. § 352-c(1) *see also* G.B.L. § 352(1) (using nearly identical language).

The courts of this State have long recognized that the broad language of the Martin Act's antifraud provisions is not restricted to public securities offerings. *See People v. Lavrowsky*, 3 Misc. 2d 600, 601 (Sup. Ct. N.Y. County 1956) ("a showing of a public offering is not necessary" under § 352); *People v. Abbott*, 4 Misc. 2d 565, 565-66 (Sup. Ct. N.Y. County 1955) (Attorney General could bring Martin Act claim against a single victim in a private sale of securities);

People v. Ruthven, 160 Misc. 112, 114 (City Ct. of Rochester 1936) ("where fraud or fraudulent practices are involved, investigation and prosecution follow, whether or not the sales were made 'to the public"').

Indeed, in *Landes*, 84 N.Y.2d 655, this Court did not suggest that the public or private nature of a securities offering had any relevance to the defendant's conviction for making oral misrepresentations in violation of the antifraud provision of ***45** G.B.L. § 352-c(1), despite holding in the same opinion that the defendant had made a public offering in order to sustain his conviction on a separate charge of failing to register as a dealer under G.B.L. § 359-e(3), which applies only to dealers who make offerings "to the public." [FN14]

> FN14. The *Roni* plaintiffs point out (Br. at 36) that G.B.L. § 359-f(2)(d) allows the Attorney General to exempt "limited" offerings to forty or fewer persons from certain Martin Act registration requirements. But again, all parties concede here that the transactions were not subject to the offering-plan registration requirements or any other registration requirement under the Martin Act. This says nothing about whether the antifraud provisions of the Martin Act apply.

Accordingly, the Appellate Division improperly narrowed the scope of the Martin Act's general prohibition of fraudulent and deceptive conduct in connection with securities transactions.

B. The Promoters' Alleged Conduct Occurred "In Connection With the Purchase or Sale of Securities In or From" New York.

In addition, Supreme Court erred in opining that the transactions here were beyond the territorial reach of the Martin Act. Although the Appellate Division did not reach this issue, the *Roni* plaintiffs continue to press it before this Court.

***46** The Martin Act is a broad remedial statute empowering the Attorney General to protect the integrity of New York securities markets. The Act's antifraud provisions apply to deceptive conduct "engaged in to induce or promote" the purchase or sale of securities or commodities "within or from this state." G.B.L. § 352-c(1); see also G.B.L. § 352(1) (using nearly identical language).

The Roni plaintiffs argue (at 37) that the transactions do not qualify because "the interests in the Property LLCs were offered by [defendants] ... in Israel to a limited number of Israeli residents." But regardless of where the promoters first solicited the investments (and the record does not even make that location clear), there can be no doubt that the alleged deceptive conduct was "engaged in to induce or promote" securities transactions "within or from" New York. G.B.L. § 352-c(1).

The record shows that the Israeli residents were required to form LLCs in the United States as the vehicle for their invest-ments in the Property LLCs, and the amended complaint expressly alleges that those single-purpose investment vehicles ***47** were all "qualified to do business in New York" (RR 52-55). The amended complaint also alleges that the promoters were all New York City residents (RR 59-60), and public records show that the Property LLCs in which plaintiffs invested were formed in New York.[FN15] The record further shows that plaintiffs wired their investments to a bank account in New York (*see, e.g.*, RR 385, 409, 410). Moreover, the underlying real estate acquired by the Property LLCs was located in Harlem and the Bronx, and the closings on those properties, funded by plaintiffs' investments, took place in New York City (*see, e.g.*, RR 299, 324-326). *Cf. Black River Assocs. v. Newman*, 218 A.D.2d 273, 281 (4th Dep't 1996) (noting that "[t]he stability of real estate ownership is of vital concern to the situs state").

> FN15. To search the relevant public records, see Business & Corporation Database, at http://www.dos.state.ny.us/corps/bus_entity_ search.html, and enter the names of the properties, e.g., "Harlem I, LLC" or "Harlem II, LLC," in the field for "Business Entity Name."

The *Roni* transactions bear no resemblance to the trans-actions in the two federal cases cited by plaintiffs that held the

challenged securities transactions to be outside the territorial ***48** scope of the Martin Act. Both of the cited cases involved financial transactions that occurred wholly outside New York. *See* *Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt. LLC*, 376 F. Supp. 2d 385 (S.D.N.Y. 2005) (holding that the Martin Act did not apply to investments in hedge funds where interactions between the investors and the funds occurred exclusively outside New York); *Lehman Bros. Commercial Corp. v. Minmetals Int'l Non-Ferrous Metals Trading Co.*, 179 F. Supp. 2d 159, 165 (S.D.N.Y. 2001) (finding that the Martin Act did not apply to the sale of Thai-baht denominated certificates of deposit by London and Hong Kong brokers to an investor in Shanghai). In the Roni transactions, by contrast, the investors were single-purpose LLCs qualified to do business in New York, they invested in New York LLCs that solely held New York real estate, and the investors wired their investment funds to New York bank accounts to finance property closings in New York. Thus the securities transactions here plainly occurred in or from New York.

This Court has yet to address the territorial reach of the Martin Act and should not do so for the first time in this private ***49** litigation. Instead, the Court should confirm that the Martin Act does not preempt independent common-law causes of actions, and thus that the scope of the Attorney General's powers under the Martin Act is irrelevant to this private action and others like it.

50CONCLUSION

For the foregoing reasons, this Court should hold that the Martin Act does not preempt independent private common-law causes of action, and should vacate as unnecessary to the decision, or alternatively as erroneous, the determinations in Roni concerning the scope of the Martin Act.

Dated: New York, NY July 14, 2011

ASSURED GUARANTY (UK) LTD., in its own right and in the right of Orkney Re II PLC, Plaintiff-Appellant, v. J.P. MORGAN INVESTMENT MANAGEMENT INC., Defendant-Respondent. RONI LLC, et al., Plaintiffs-Respondents, v. Rachel L. ARFA, et al., Defendants-Appellants, Gadi Zamir, et al., Defendants.
2011 WL 7452124 (N.Y.) (Appellate Brief)

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