



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

DIVISION OF ECONOMIC JUSTICE
INVESTOR PROTECTION BUREAU

October 1, 2019

VIA EMAIL AND E-FILE

Hon. Joel M. Cohen
Supreme Court, New York County
60 Center Street, Room 570
New York, New York 10007

Re: In re: Letitia James v. iFinex Inc., et al., Index No. 450545/2019

Dear Justice Cohen,

The Office of the Attorney General (“OAG”) submits this letter in accordance with the Court’s Decisions and Orders of May 16, 2019 (Docket No. 76) and August 19, 2019 (Docket No. 115), which directed the OAG to set forth the basis upon which the injunctive provisions in the April 24, 2019 Order Pursuant to Gen. Bus. L. § 354 (hereinafter, “354 Order”) should be extended.

As the Court may be aware, the First Department recently stayed enforcement of the August 19 Order pending appeal, pausing production of documents called for by the 354 Order. However, that stay does not extend to the portion of this Court’s August 19 Order extending the 354 injunction. Nor does it otherwise limit this Court’s statutory obligation to facilitate the 354 process. Accordingly, the OAG respectfully requests that this Court (1) extend the injunction to expire no fewer than ninety days following the lifting of the stay, should the OAG prevail on appeal, and (2) issue an order that Respondents search for and collect all documents and information called for by the 354 Order, so that upon any lifting of the stay those materials are immediately produced to the OAG without further delay.

Background

Immediately following the August 19 Order, which denied Respondents’ motion to dismiss, extended the injunction, and denied a stay of production, the OAG asked Respondents to confer with the OAG in order to propose a timetable for production of the materials called for in the 354 Order, some of which had already been collected by Respondents and available for immediate production. On August 21, Justice Gesmer denied Respondents’ application for an interim stay pending full briefing of the stay motion before the Appellate Division. Even with no stay in place, Respondents declined to produce responsive materials, only providing a timetable

for production after several weeks of delay. Respondents also informed OAG that they would not produce documents and information regarding the following items:

- 354 Order Item (i), Nov. 27, 2018 Subpoena Request E.1: All Documents and Communications previously produced to the U.S. Commodity Futures Trading Commission Concerning Tether, Bitfinex, tethers, or related matters;
- 354 Order Item (xii): Respondents' tax filings for the year 2017 and 2018;
- 354 Order Item (xiii): A report, no less often than weekly, with supporting documents and communications, evidencing any issuances or redemptions of tethers to or from Tether or Bitfinex, which shall include identification of the purchaser or redeemer of tether, the amount of tethers purchased or redeemed, how long the purchase or redemption request took to fulfill, the wallet address the tethers were sent to/came from, and how the tethers were paid for/paid out.

Respondents also took the position that all or parts of Items (i), (ii), (viii), (ix), (x), (xi), (xiv) and (xv) of the 354 Order should be "narrowed" to only require production of materials concerning customers alleged to be New York-based, under Respondents' own definition of what constitutes a "New York" customer. The OAG declined to limit or "narrow" the 354 Order, not only because the order is clear about what Respondents are required to produce, but because any such "narrowing" would eliminate the OAG's ability to conduct a thorough, or even coherent, investigation.

At a meeting with the Special Referee on September 13, Respondents reiterated that they would not produce certain materials. The OAG stated that Respondents had to produce all materials called for in the 354 Order. The Special Referee declined to order production of any immediately-produceable materials (i.e. the materials Respondents have already reviewed and collected). The Special Referee also did not set a comprehensive schedule for compliance with the 354 Order going forward, instead merely requiring Respondents to produce documents they had "agreed" to produce.

On September 24, the Appellate Division granted Respondents' motion to stay enforcement of the August 19 Order, on the condition that the appeal is perfected on or before November 4, 2019 for the January 2020 Term.

And so, even though one month elapsed between the issuance of this Court's August 19 Order and the stay, no documents were produced. That means that since the granting of the 354 Order in April, Respondents have failed to produce a single non-jurisdictional document. Given the time frame for appeal outlined by the First Department, several more months will elapse before the stay is lifted and documents produced.

The Injunction Should be Extended

Since the 354 process began, the OAG has maintained that the injunction should persist until Respondents produce the materials called for in the 354 Order. This Court, recognizing the parties' competing interests, held that the injunction should be reevaluated after a reasonable period, in this case eight weeks after the August 19 Order was issued. The Court also expressed "expectation . . . that the investigation be free of further delay."¹

There has been nothing but delay. No progress has been made, and Respondents have been crystal clear that their litigation strategy is to delay this process as long as they can, by procedural maneuvers and duplicative motion practice. The OAG therefore requests that the Court extend the injunction to expire at least ninety days after the First Department decides the pending appeal, should the OAG prevail.

Respondents Should Be Ordered to Search for and Collect All Documents and Information Called for in the 354 Order

As the Court has already recognized, Gen. Bus. L. § 354 imposes a "statutory mandate [for] the Court to facilitate" the OAG's investigation of Respondents. (August 19 Order at 8; *see also* May 16 Order at 7.) The OAG has previously articulated to the Court why seriatim motion practice, and continued stays of document and information production during the long pendency of those motions, undermines that clear statutory mandate. And while it was in the discretion of the First Department to grant a stay of production of documents pending outcome of the appeal, this Court still has the statutory obligation to facilitate the 354 process within the bounds of that stay. The stay does not limit this Court's authority to otherwise ensure orderly and efficient management and facilitation of the OAG's investigation.

Respondents were very clear what they believe to be the harm to them should production under the 354 Order not be stayed during appeal – production to the OAG: "Absent a stay, the Companies will be forced to produce the very discovery they will be arguing on appeal is unauthorized. Once the discovery is produced, any relief provided by this Court will be effectively meaningless." (August 21, 2019 Stay Motion, at 1 (emphasis omitted).)

Accordingly, the Court should direct Respondents to search for and collect all documents and information called for in the 354 Order, so that full and immediate production can be made to the OAG once the appeal concludes.² Unless the Court directs Respondents to collect these materials now, what will happen is predictable: Respondents will, upon lifting of the stay, argue for more time to search and collect materials, file more motions challenging the scope of the 354 Order, and otherwise take whatever steps they believe will be tolerated by the Court to further

¹ July 29, 2019 Hearing Transc. at 68:16-17.

² Respondents have, since at least 2018, collected, reviewed, and produced materials in other proceedings that substantially overlap what is called for in the 354 Order. In other words, any work done in connection with this proceeding (during the pendency of the stay or otherwise) is not starting from zero. At the very least, the Court should direct Respondents to explain, in detail, what materials they have already searched for and collected, and delineate how those materials are responsive to each of the items in the 354 Order. The Court should also direct Respondents describe and explain what materials called for in the 354 Order do not exist.

delay the OAG's investigation. By ordering Respondents to get materials in order now, the Court will ensure an orderly process and will facilitate the conclusion of the OAG's investigation.

The OAG is prepared to appear before the Court as necessary on this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John D. Castiglione". The signature is fluid and cursive, with the first name "John" being the most prominent.

John D. Castiglione
Senior Enforcement Counsel