SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF JEFFERSON

PEOPLE OF THE STATE OF NEW YORK, by BARBARA D. UNDERWOOD, Attorney General of the State of New York,	:	Index No.: EF2018-00002478
	:	Motion Seq. No. 01
Plaintiff,	:	Oral Argument Requested
-against-	:	
HARRIS ORIGINALS OF NY., INC., *et al.*,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

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Pursuant to New York CPLR § 3211, by and through undersigned counsel, Defendants Harris Originals of NY, Inc.; Harris Originals of Watertown NY, Inc.; Consumer Adjustment Corp.; Consumer Adjustment Corp., USA; Harris Originals of California, Inc.; Harris Originals of CO, Inc.; Harris Originals of Colonial Heights, VA, Inc.[1]; Harris Originals of Columbiana SC Inc.; Harris Originals of El Paso TX Inc.; Harris Originals of FL., Inc.; Harris Originals of Freedom Village NC Inc.; Harris Originals of GA., Inc.; Harris Originals of IL, Inc.; Harris Originals of Jacksonville, N.C., Inc.; Harris Originals of Killeen, TX, Inc.; Harris Originals of KS Inc.; Harris Originals of N. C., Inc.; Harris Originals of Newport News, VA, Inc.; Harris Originals of No. Illinois Inc.; Harris Originals of Norfolk, VA, Inc.; Harris Originals of Oceanside, CA., Inc.; Harris Originals of Pearlridge HI Inc.; Harris Originals of San Antonio, TX. Inc.; Harris Originals of San Diego, Inc.; Harris Originals of Savannah GA Inc.; Harris Originals of Texas, Inc.; Harris Originals of TN., Inc.; Harris Originals of VA., Inc.; Harris Originals of WA Inc.; Harris Diamond Company of N.C., Inc.; Harris Jewelry & Electronics; Oomph, Inc.; Harris Jewelry; Consumer Growth Partners LLC; John Zimmermann[2]; Susan Harris; Beverly Harris; Sandi Harris-Pleeter; Richard Baum; and David Malane (collectively, "Defendants") hereby request that the Court dismiss the New York Attorney General's ("NYAG") Verified Complaint (the "Complaint") for the reasons set forth below. Affirmation of Allyson B. Baker in Support of Motion to Dismiss Plaintiff's Verified Complaint ("Baker Affirmation"), at Ex. 1.

PRELIMINARY STATEMENT

On October 29, 2018, without having provided the statutorily-mandated notice that must precede a lawsuit by the NYAG and before serving any defendant, the NYAG publicly announced

[1] Harris Originals of Colonial Heights, Va, Inc. was incorrectly named in the complaint as "Harris Originals or Colonial Heights, Va, Inc."

[2] Defendant John Zimmermann was incorrectly named in the Complaint as "John Zimmerman."

that it had filed a Complaint against Harris Originals of New York, Inc. ("Harris") and others, including by posting a copy of the Complaint on its website, along with an inflammatory press release.[3] In fact, the Complaint publicly revealed commercially sensitive and proprietary information that Harris produced to the NYAG and designated as confidential; this disclosure directly contravened the parties' confidentiality agreement that the NYAG drafted. And, as if to add further fuel to this fire, the NYAG simultaneously issued a sensationalist press release replete with inaccurate facts that also highlighted its predominant and flawed theory of the case.

The Complaint relies on a dubious legal theory of "hidden interest" – a term apparently coined by the NYAG, and not a recognized financial, economic, or legal term – to baselessly assert that Harris charges an impermissible retail price for its jewelry, even though it does not and the NYAG has no legal authority to regulate retail prices. Moreover, the Complaint further contends that this impermissible retail price results in a so-called "hidden interest" that attaches to the sales price of all jewelry. This "hidden interest" theory, which is the predicate for nearly all of the Complaint, is not supported by law or facts or economics, for that matter. The remaining claims in the Complaint are similarly baseless because they fail to state a cause of action upon which relief can be granted. In addition, the Court lacks personal jurisdiction as to numerous Defendants. The Court should dismiss the Complaint with prejudice for all of these reasons, as well as the fact that the NYAG did not abide by its own statutorily-prescribed notice requirements.

[3] *See* Press Release by New York Attorney General Barbara D. Underwood (Oct. 29, 2018), https://ag.ny.gov/press-release/ag-underwood-announces-lawsuit-against-harris-jewelry-targeting-military.

FACTUAL BACKGROUND

Harris Originals of NY, Inc. ("Harris") is a small, family-owned retailer with headquarters in Suffolk County, New York. Harris has 21 retail locations,[4] which sell jewelry to the general public, with an emphasis on serving military members. Consumer Adjustment Corp. USA ("CACUSA"), an affiliate of Harris, underwrites the financing agreements between Harris and its customers.

Over the past several years, in response to subpoena requests by the NYAG, Harris cooperatively produced thousands of pages of documents and other information, including hours of deposition testimony, to the NYAG. Much of the information provided in response to the subpoenas contains confidential, commercially-sensitive, and proprietary information, including financial documents, customer information, and proprietary training materials. Because of the sensitive nature of this information, Harris requested that the parties enter into a Confidentiality Agreement. In the Spring of 2017, the parties executed an agreement that the NYAG drafted, signed, and subsequently breached.

On October 29, 2018, the NYAG instituted this action against Harris; CACUSA; CACUSA's predecessor, Consumer Adjustment Corp. ("CAC"); the corporations for all Harris stores, including some that have been closed since before the NYAG's investigation began; Consumer Growth Partners LLC, an investment and advisory firm that has provided advisory services to Harris but has no financial stake in any Defendant; individuals who are members of the Harris board, and Harris's president and CEO.

[4] There are Harris stores in Colorado Springs, Colorado; Pensacola, Florida; Columbus, Georgia; Fort Benning, Georgia; Gurnee, Illinois; Manhattan, Kansas; Watertown, New York; Fayetteville, North Carolina; Jacksonville, North Carolina; Clarksville, Tennessee; Fort Bliss, Texas; Killeen, Texas; San Antonio, Texas; Wichita Falls, Texas; Colonial Heights, Virginia; Newport News, Virginia; Virginia Beach, Virginia; and Tacoma, Washington. Each store is separately incorporated in the state where it is located.

ARGUMENT

I. The Complaint Must Be Dismissed Because the NYAG Failed to Provide Statutorily- and Contractually- Required Notice

A. The NYAG Failed to Comply With the Notice Provisions of Executive Law § 63(12) and General Business Law § 349

Both Executive Law § 63(12) and New York General Business Law ("GBL") § 349 vest the Attorney General with the authority to seek relief on behalf of the public for certain alleged acts of fraud and deceptive conduct. N.Y. EXEC. § 63(12); N.Y. GEN. BUS § 349(b). As a prerequisite to bringing suit under these provisions – as the NYAG has undisputedly done here – both statutes require the NYAG to provide five days' notice to potential defendants before filing a complaint. N.Y. EXEC. § 63(12); N.Y. GEN. BUS. § 349(c). These provisions are mandatory. Neither provision gives the NYAG the authority or discretion to simply decide not to provide the required notice. Yet, here it is undisputed that the NYAG has failed to comply with either of these mandatory statutory requirements; the NYAG provided no notice at all to the Defendants in advance of filing its Complaint. Accordingly, the Complaint must be dismissed for this reason alone.

The mandatory notice provision of GBL § 349(c) states:

> Before any violation of this section is sought to be enjoined, the attorney general ***shall be required*** to give the person against whom such proceeding is contemplated notice by certified mail and an opportunity to show in writing within five business days after receipt of notice why proceedings should not be instituted against him[.]

Id. (emphasis added).[5] Similarly, Section 63(12) states: "the attorney general may apply, in the name of the people of the state of New York, to the supreme court of the state of New York, *on*

[5] There is only one exception to the requirement that the Attorney General give pre-litigation notice under GBL § 349, but that exception, which concerns a request for preliminary relief, does not apply here. Specifically, GBL § 349 permits the NYAG to seek preliminary relief, such as a preliminary injunction or temporary restraining order, pursuant to CPLR 63, without providing notice first. *See* N.Y. GEN. BUS. § 349(b) ("In such action preliminary relief may be granted under article sixty-three of the civil practice laws and rules."); N.Y. GEN. BUS. § 349(c) (requiring notice "unless the attorney general shall find, *in any case*

notice of five days, for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts…" (emphasis added). Here, the NYAG followed neither of these directives.

The United States Supreme Court has held that statutory notice provisions must be strictly enforced. *Hallstrom v. Tillamook Cty*., 493 U.S. 20, 31 (1989). Thus, "if an action is barred by the terms of a statute, it must be dismissed." *Id.* In *Hallstrom*, the Court affirmed the dismissal of a Resource Conservation and Recovery Act lawsuit, because the plaintiffs failed to provide the alleged violator with the statutorily prescribed 60-days' notice before filing suit. Relying on the plain language of the statute, the Court explained, "strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Id.* (quoting *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980)). There, the Court dismissed a case because the defendant did not receive sixty days' notice. It stands to reason that here, too, the Court should dismiss with prejudice the Complaint because the NYAG failed to provide the mere five-days' notice that New York statute mandates.

Indeed, New York courts also strictly construe such notice provisions. For example, in *Amabile v. City of Buffalo*, the Court of Appeals emphasized that "[p]rior notification laws are a valid exercise of legislative authority," and enforced a statutory requirement that a putative plaintiff provide a municipality with notice of an unsafe condition before filing suit, despite the plaintiff's claim that the municipality had been on "constructive notice" of the problem. *Amabile v. City of Buffalo*, 93 N.Y.2d 471, 476 (N.Y. 1999). To ignore such notice provisions would be to violate the well-established canon of statutory construction "that all parts of a statute are intended

in which he seeks preliminary relief, that to give such notice and opportunity is not in the public interest"); *cf. People v. P.U. Travel, Inc.*, 2003 N.Y. Misc. LEXIS 2010, at *11 (Sup. Ct. N.Y. County June 19, 2003). There is no such exception here.

to be given effect and that a statutory construction which renders one part meaningless should be avoided." *Matter of Springer v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y.*, 27 N.Y.3d 102, 107 (N.Y. 2016) (internal quotation and citation omitted).

The United States Court of Appeals for the Second Circuit has further elaborated that "strict compliance with the notice and delay provisions fulfills Congressional intent." *Brod v. Omya, Inc.*, 653 F.3d 156, 165 (2d Cir. 2011). Neither courts nor plaintiffs may simply disregard explicit statutory provisions. Indeed, ignoring these notification provisions would contravene the legislative intent behind those provisions in the first instance.

The fact that the government is the party that violated the notice requirement hardly renders that violation less fatal to its claims. To the contrary, if anything, the Office of the New York Attorney General has a heightened need to adhere to the very laws it is charged with enforcing. Courts in this state, in turn, also have insisted that government actors adhere to statutorily-mandated notification provisions. For example, a few weeks ago, a state trial court judge enforced a notice provision requiring a municipality to provide a property owner with 10 days' notice to repair an unsafe condition before the municipality may undertake the repair itself and charge the property owner for the expense. *See Vill. Of Monticello v. 56-60 Broadway, Inc.*, No. 1814-2017, 2018 WL 5812516, at *5-8 (Sullivan County Ct. Nov. 2, 2018). There, the court explained, "[t]he Village Code plainly states that the Village was required to provide 56-60 Broadway with ten (10) days written notice . . . The Village legislature drafted the Village Code and had the opportunity to include exceptions to providing ten (10) days['] notice to property owners in emergency situations and the like, yet failed to include any." *Id.* at *7-8.

The court's holding in *Village of Monticello* is consistent with the U.S. Supreme Court's instruction that notice provisions are "***mandatory conditions precedent***" to commencing suit, and

that a court "***may not disregard these requirements at its discretion***." *Hallstrom*, 493 U.S. at 31 (emphasis added). The same rule applies here: GBL § 349 and Executive Law 63(12) require the NYAG to have provided notice to Harris. The NYAG did not provide the required notice, and this failure to abide by the notice requirements mandates dismissal of its Complaint.

These provisions – particularly GBL § 349(c) – ensure that parties the NYAG believes to be in violation of the law have an opportunity to explain why the NYAG should not institute an action against them. The opportunity to explain to the NYAG why it should not institute these proceedings is particularly significant here. The NYAG's action relies entirely on a misunderstanding of the Defendants' business – despite a protracted investigation – and a mischaracterization of the thousands of pages of documents and hours of testimony that the Defendants have produced to date. If the NYAG had complied with its own laws, the Defendants would have had the opportunity to respond to the statutorily-required notification which no doubt exists to ensure that complaints that rely on misstatements of facts (and law), such as this one, are not filed. Indeed, the Defendants should have had the opportunity to work with the NYAG to try to avoid a highly public lawsuit replete with misstatements that also involve the unlawful disclosure of non-public information. The NYAG did not abide by New York statutory notification laws. And for this reason alone, as compelled by precedent from this State's courts, the Second Circuit and the Supreme Court, the Complaint should be dismissed with prejudice.

B. The NYAG Violated the Parties' Confidentiality Agreement and Failed to Comply With Its Contractually-Required Notice Provisions

In violation of the parties' Confidentiality Agreement, the NYAG included at least twenty paragraphs in the Complaint that rely upon or directly cite information that was designated as "confidential" and produced in response to the investigation. Moreover, many of the images included in the Complaint are excerpts of a document that was designated as "confidential,"

pursuant to the terms of the Confidentiality Agreement. Although the NYAG has apparently removed the confidentiality designation from these excerpts, the excerpts included in the Complaint clearly state: "This publication is the exclusive property of Harris Jewelry and is for INTERNAL USE ONLY. The information contained herein is considered privileged. Distribution of any content outside of Harris Jewelry is prohibited." *See, e.g.*, Compl. ¶¶ 54, 56, 59 (emphasis in original). Not only is it obvious from the face of the Complaint that these documents should not have been excerpted – yet they brazenly were – it is obvious from the terms of the Confidentiality Agreement that the documents should not have been utilized in the Complaint or any public filing.

The Confidentiality Agreement (which the NYAG drafted) provides, among other things, that:

> [s]hould any litigation or legal proceedings be initiated against Harris by any State Attorney General utilizing any documents marked or designated by Harris as "Confidential" the State Attorney General may use any such materials in the litigation in order to ensure compliance with State or federal law except to the extent such use is prohibited by law. Any State Attorney General who intends to use such materials in litigation ***shall make all reasonable and good faith efforts to negotiate with Harris a protective or confidentiality order*** of any applicable court or administrative body designed to ensure appropriate protection of the materials and govern their use, including with respect to such obligations as to filing documents under seal or on a redacted basis, as may be necessary ***before*** filing in any court or tribunal or disclosing to any third party.

Confidentiality Agreement ¶ 4 (emphasis added). Not only did the NYAG fail to make "reasonable" or "good faith efforts" to negotiate a protective order, it made *no* efforts to do so. Nor did the NYAG file the Complaint under seal or redact any of the averments that cite non-public facts.

The Confidentiality Agreement serves a real purpose: to protect Harris's confidential and proprietary information from disclosure. Yet the NYAG completely disregarded it. Instead, it

issued a press release regarding the filing of the Complaint, including posting a copy of the Complaint to its website, before even serving the Complaint on any of the Defendants. Accordingly, the Complaint should be dismissed.

II. The Complaint Should Be Dismissed Pursuant to CPLR 3211(a)(7) For Failure To State A Cause of Action.

A. Legal Standard

When ruling on a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), the court must decide whether the facts alleged state a cognizable claim to relief. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (N.Y. 1977). "While it is axiomatic that a court must assume the truth of the complaint's allegations, such an assumption must fail where there are conclusory allegations lacking factual support." *Dominski v. Frank Williams & Son, LLC*, 848 N.Y.S.2d 791, 792 (4th Dept 2007) (quoting *Elsky v. KM Ins. Brokers*, 527 N.Y.S.2d 446, 446-47 (2d Dept 1988)).[6]

[6] Along with a motion to dismiss under CPLR 3211, either party may submit "any evidence that could properly be considered on a motion for summary judgment." CPLR 3211(c). A court may consider that evidence in ruling on a motion to dismiss without treating the motion as one for summary judgment. *See Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635 (N.Y. 1976). For example, "[u]nder CPLR 3211 a trial court may use affidavits in its consideration of a pleading motion to dismiss." *Id.* (internal citations omitted). Therefore, when factual allegations in the complaint are contradicted by evidence in the record, the plaintiff's claims should be dismissed. As the Fourth Department has held, "'factual claims which are flatly contradicted by the evidence are not presumed to be true on a motion to dismiss for failure to state a cause of action.'" *Olszewski v. Waters of Orchard Park*, 758 N.Y.S.2d 716, 717 (4th Dept 2003) (quoting *Meyer v. Guinta*, 692 N.Y.S.2d 159, 161 (2d Dept 1999)). Because those facts are not presumed true, "dismissal might be obtained under CPLR 3211(a)(7) with sufficiently 'conclusive' evidentiary submissions." *Liberty Affordable Hous., Inc., v. Maple Ct. Apts.*, 998 N.Y.S.2d 543, 547 (4th Dept 2015) (citing *Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.*, 115 A.D.3d 128, 133-35 (1st Dept 2014)).

When a court considers evidentiary material in deciding a motion to dismiss under CPLR 3211(a)(7), "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Guggenheimer*, 43 N.Y.2d at 275. But where, as here, the defendant can show "that . . . material fact[s] as claimed by the pleader . . . [are] not . . . fact[s] at all," the claims that depend on their truth should be dismissed. *Id.*

B. The NYAG's Usury Theory Has No Basis in Law or Fact

The NYAG alleges three usury claims against Defendants, all of which rely on the NYAG's faulty approach to the calculation of interest. Specifically, Counts One, Two, and Three rest on the NYAG's re-characterization of principal as "hidden interest" – which the NYAG presents as a purported legal or financial term of art; in actuality this concept is nothing more than a made-up catch-phrase. At that, the NYAG alleges no facts from which the Court could plausibly find that Harris charges interest rates greater than 16%, 25%, or 36% per annum. Moreover, the NYAG fails to allege any facts in support of Harris's intent to charge usurious rates. Accordingly, the NYAG fails to state a claim of usury as a matter of law, and Counts One, Two, and Three must be dismissed.

1. The NYAG's interest calculations rely upon unfounded facts and illogical assumptions and defy basic principles of finance.

Despite acknowledging that Harris charges a contractual rate of 14.99% APR or less on all credit purchases, *see* Compl. ¶ 76, the Complaint baselessly alleges that Harris "actually" charges interest rates as high as 316.28%. Compl. ¶ 115. To support its claim, the NYAG relies on a concept it calls "hidden interest," and it alleges that "interest" includes factors such as: markups of merchandise, shipping and handling fees, sales tax, and the purchase of other products at the time of sale. Compl. ¶¶ 111-14. But these factors and costs are not "interest." Indeed, there is no law or accepted financial or economic definition that supports the Complaint's apparent and unfounded definition of interest.

Where consumer goods are bought on credit (like the transactions at issue here), the "assets lent" are the goods sold and the "principal" is the retail price of those goods. Embedded in most retail prices is a "markup," which refers to the amount at which the goods are sold above the cost the retailer paid to acquire them. *See Markup Law and Legal Definitions*, USLEGAL,

https://definitions.uslegal.com/m/markup/. A markup can vary widely depending upon industry, business, and goods sold. *See id.* In the jewelry industry, markups are especially varied, and there is no consensus industry standard. Costs, such as shipping and handling, are also commonplace and vary. Interest is not an amalgamation of markup and other costs. It is a specifically defined term under federal law and state law. *See, e.g.*, N.Y. BANKING § 14-a(2) ("The rate of interest as so prescribed under this section shall include as interest any and all amounts paid or payable, directly or indirectly, by any person, to or for the account of the lender in consideration for the making of a loan or forbearance as defined by the superintendent pursuant to subdivision three of this section."). It also has a common everyday definition; interest is "a charge for borrowed money generally a percentage of the amount borrowed." *Definition of interest,* MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/interest. The Complaint adopts a definition of interest that has no grounding in law or even common colloquial usage.

Typically, the annual interest rate, or APR (annual percentage rate), is calculated by taking the amount of interest paid on the principal during each pay period (i.e., installment), and multiplying that rate by the number of pay periods during a given year. David Vicknair & Jeffrey Wright, *Annual Percentage Rate and Annual Effective Rate: Resolving Confusion in Intermediate Accounting Textbooks*, 8 AM. J. BUS. EDUC. 207, 209 (2015), https://files.eric.ed.gov/fulltext/EJ1069045.pdf. Harris charges an APR of 14.99% or less on every purchase made on credit.[7] *See* Compl. ¶ 76.

[7] The NYAG misrepresents or misunderstands the "per payday payment," which permits customers to make smaller payments each pay period (typically half as much, twice a month), instead of monthly payments. Finance charges are added to the customer's balance monthly, based on an average outstanding balance, at an annual rate of 14.99% or 1.25% per month. In no event does Harris charge anything more than 14.99% APR. To the extent the NYAG claims that Harris charges more than 14.99% on contracts that utilize the "Per Payday Payment" structure, Compl. ¶ 77, the NYAG misunderstands and misrepresents the nature of Harris's contracts, and also the calculation of interest on installment contracts. Like the other misunderstandings and misrepresentations in the NYAG's Complaint, this could have easily been resolved

Instead, the NYAG avers a tortured theory of interest. The Complaint invents a theory of how the jewelry industry prices merchandise, alleging that "widely-recognized jewelry industry standards typically allow for 'keystone' pricing, in which a retailer doubles its wholesale cost in setting its retail price" and that, "[a]t times, jewelry retailers utilize triple keystone pricing." Compl. ¶ 91. Similarly, the NYAG assumes that "an industry-acceptable retail price mark-up would be triple keystone, or three times the wholesale price." Compl. ¶ 112. On that basis, the NYAG calculates a difference between Harris's retail price and the "hypothetical triple keystone retail price,"[8] and re-characterizes that portion of Harris's markup as "hidden interest." Compl. ¶ 112. Next, the NYAG takes the finance charge under the contract (at 14.99%), and adds that to the newly-calculated value of "hidden interest," as well as the costs for shipping and handling, sales taxes, and any purchases for unrelated products the customer may have made at the time of sale. Lastly, the NYAG takes that total calculated value, divides it by "hypothetical triple keystone retail price," and arrives at an interest percentage which would have been charged had Harris set its retail price at the NYAG's "hypothetical triple keystone retail price," an analysis that has no grounding in fact, let alone the laws of this State. The NYAG's calculation is not an interest calculation. Indeed, any retail markup is a portion of the principal in a consumer credit transaction, and is not a component of interest. *See, e.g.*, *Wilkins v. M&H Financial, Inc.*, 476 F. Supp. 212, 217 (E.D. Ark. 1979). Similarly, sales taxes, shipping and handling fees, and the purchase prices of other products also do not comprise interest.

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if the NYAG had given Harris notice of the impending Complaint. More easily, the confusion could have been resolved by asking a simple question of Harris or its counsel.

[8] In addition, the NYAG frequently cites inaccurate wholesale costs as the basis for its "hypothetical triple keystone retail price." This understates the "hypothetical" industry standard value and overstates the amount of alleged markup above that "hypothetical" industry standard.

Moreover, usurious intent must also be alleged and ultimately proved.[9] "To successfully raise the defense of usury, a debtor must allege and prove by clear and convincing evidence that a loan or forbearance of money, requiring interest in violation of a usury statute, was charged by the holder or payee with the intent to take interest in excess of the legal rate." *Blue Wolf Capital Fund II, LP v. Am. Stevedoring Inc.*, 961 N.Y.S.2d 86, 89 (1st Dept 2013); *see also Freitas v. Geddes S&L Ass'n*, 63 N.Y.2d 254, 260-61, 265 (N.Y. 1984) (noting requirement of "clear and convincing evidence of each element of usury, including usurious intent," and affirming judgment that plaintiffs had "failed to establish by clear and convincing proof that the bank . . . had a general intent to take and receive a rate of *interest* in excess of . . . the prevailing rate"). The Complaint alleges no facts that support its allegation that Harris intends to treat a retail markup as interest, despite the heavy burden that the NYAG must overcome here. Indeed, New York courts are clear that there is a recognized "presumption against a finding of usury. . . ." *Roopchand v. Mohammed*, 62 N.Y.S.3d 514, 517 (2d Dept 2017) (recognizing *Freitas*, 63 N.Y.2d at 261 ("[u]sury penalties imposed for the violation of the statute are to be strictly construed and should not be held to include any violation which is not clearly within the plain intention of the statute") (citing *Di Nome v. Personal Fin. Co.*, 291 N.Y. 250, 253 (N.Y. 1943)).

In any event, Harris's customers pay the same retail price for jewelry regardless of whether these customers finance their purchase or pay for that purchase with cash at the time of sale.[10] This

[9] For Count Two, the NYAG must also show that Harris "knowingly" charged a rate of interest on a loan or forbearance in excess of 26% per annum. Under New York law, "a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists." N.Y. PENAL LAW § 15.05. The NYAG, however, alleges only conclusory assertions as to the nature of Harris's intent, which are insufficient to support this cause of action.

[10] This holds true for all other elements of principal which the NYAG seeks to recast as "hidden interest," including sales taxes, shipping and handling costs, teddy bears, protection plans, etc. *See* Compl. ¶ 111.

alone dismantles the allegation of hidden interest, as interest as a concept only exists when a purchase is financed. Indeed, accepting the fact that there is such a thing as "hidden interest," and that it is defined as alleged in the Complaint would compel a conclusion that even one-time cash purchases carry an allegedly usurious "interest" rate, despite the fact that goods are paid for in full at the time of purchase. Logic alone necessitates dismissal of Counts One, Two, and Three.

2. The NYAG is not authorized to regulate pricing of goods and services.

The NYAG has no authority to regulate the retail prices that Harris charges for jewelry. "To be sure, the Attorney General has no power to act as an 'overseer or policeman' of prices, and nothing in the law gives him (or the Judiciary) 'the power to set economic policy.'" *People ex rel. Spitzer v. Pharmacia Corp.*, 895 N.Y.S.2d 682, 697 n.12 (Sup. Ct., Albany County 2010) (quoting *Hertz Corp. v. Attorney-General of N.Y.*, 518 N.Y.S.2d 704, 709-10 (Sup. Ct., N.Y. County 1987)). Indeed, "the prices charged by private business to customers generally are not subject to governmental supervision under our political and economic structure, except in the case of specifically regulated industries, or upon the enactment of a broad structure of price controls in time of emergency." *Canestaro v. Raymour & Flanigan Furniture Co.*, 984 N.Y.S.2d 630 (Table), 2013 WL 6985415, at *3 (Sup. Ct., Erie County May 20, 2013) (quoting *Hertz*, 518 N.Y.S.2d at 707). In fact, Counts One, Two, and Three are thinly-veiled attempts to circumvent these limits placed on the NYAG's authority to regulate retail prices. Moreover, Harris maintains that its prices are reasonable and consistent with industry standards.

C. The Complaint Fails to State a Cause of Action for Fraud

1. Count Four Must be Dismissed Because Executive Law § 63(12) Does not Provide an Independent Cause of Action

Count Four, which alleges a violation of Executive Law 63(12), must be dismissed. Among other things, under precedent from both the New York Court of Appeals and the Fourth

Department, Section 63(12) does not provide an independent cause of action. Compl. ¶ 141. Section 63(12) is a procedural statute that confers standing on the NYAG to seek relief on behalf of the public and makes certain remedies available when the NYAG does so. *See* N.Y. EXEC. § 63(12). As the New York Court of Appeals explained in *State v. Cortelle Corp.*, Section 63(12) "did not 'make' unlawful the alleged fraudulent practices, but only provided standing in the Attorney-General to seek redress and additional remedies for recognized wrongs which pre-existed the statutes. Statutory provisions which provide only additional remedies or standing do not create or impose new obligations." 38 N.Y.2d 83, 85 (N.Y. 1975). In other words, Section 63(12) is only a provision that provides "additional remedies or standing." *Id.* It does not create any new obligations, and therefore, it does not provide the basis for an independent cause of action.

A recent decision by the Court of Appeals further supports this conclusion. In *People v. Credit Suisse Sec. (USA) LLC*, the Court of Appeals dismissed a claim by the NYAG on the grounds that it was barred by the three year statute of limitations for Martin Act claims, as the alleged Section 63(12) liability was founded upon a Martin Act claim. 31 N.Y.3d 622, 633-34 (N.Y. 2018). The Court explained that "it is undisputed that Executive Law § 63(12) gives the Attorney General standing to redress liabilities recognized elsewhere in the law, expanding the scope of available remedies." *Id.* at 633. The decision further explained that "courts must 'look through' Executive Law § 63(12) and apply the statute of limitations applicable to the underlying liability." *Id.* at 633-34 (confirming its previous analysis in *Cortelle*). Indeed, that court's instruction to "look through" Section 63(12) to the "underlying liability" makes it apparent that Section 63(12) is an enabling statute that allows the NYAG to pursue an underlying claim and that it does not provide for a separate cause of action. Otherwise, the Court of Appeals would not have

adopted the "look through" analysis because, if Section 63(12) could support an independent claim, there would never be a need to "look through" to anything.

Moreover, the Fourth Department has explicitly held that Section 63(12) cannot form the basis for an independent cause of action. "[S]ection 63(12) does not create an independent cause of action. Rather, that section is only a mechanism by which a petitioner may show that injunctive relief and restitution are proper in the event that the petitioner establishes that a respondent violated other statutes." *People ex rel. Schneiderman v. One Source Networking, Inc.*, 3 N.Y.S.3d 505, 508 (4th Dept 2015). Section 63(12) does not "alone provide[] for an independent cause of action, i.e. without resort to another statute." *Id.* Instead, it permits the NYAG to "avail himself of the remedies set forth in section 63(12) in light of allegations that respondents violated" another statute. *Id.* The Fourth Department has further explained that "Section 63(12) does not create any new causes of action, but does provide the Attorney General with standing 'to seek redress and additional remedies for recognized wrongs' based on the violation of other statutes. In other words, section 63(12) 'create[s] no new claims but *** provide[s] particular remedies and standing in a public officer to seek redress on behalf of the State and others." *People ex rel. Spitzer v. Frink Am., Inc.*, 770 N.Y.S.2d 225, 226 (4th Dept 2003) (quoting *Cortelle Corp.*, 38 N.Y.2d at 85) (omissions in original). For example, the court explained, the NYAG may bring an action pursuant to Section 63(12) to seek additional remedies that may be otherwise unavailable under the underlying statute. *Id*. at 226-27 (citing *State of New York v. Princess Prestige Co.*, 397 N.Y.S.2d 360 (N.Y. 1977) *and People v. Amer. Motor Club*, 179 A.D.2d 277, 283 (1st Dept 1992)). But Section 63(12) does not, on its own, "provide[] for an independent cause of action, i.e., without resort to another statute." *One Source Networking*, 3 N.Y.S.3d at 508. Because Section 63(12)

does not provide for a free-standing fraud claim, Count Four fails to allege a cause of action for which relief may be granted, and it must be dismissed.

2. Count Five Must be Dismissed Because the Complaint Fails to State a Cause of Action for Common Law Fraud

To state a cause of action for common law fraud, a complaint must plead facts that would establish each of the elements of common law fraud. *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 142 (N.Y. 2017) ("Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery") (internal citation omitted). "The required elements of a common law fraud claim are 'a misrepresentation or a material omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury.'" *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 31 N.Y.3d 569, 578-79 (N.Y. 2018) (quoting *Pasternack v. Lab. Corp. of Am. Holdings*, 27 N.Y.3d 817, 827 (N.Y. 2016)).

Further, for the fraud claim to survive a motion to dismiss, a complaint, including one brought by the NYAG, must meet the heightened pleading requirements of CPLR 3016(b), which states: "Where a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail." CPLR 3016(b). This is especially true in light of the Court of Appeals' decision in *Credit Suisse*. Applying the same "look through" analysis that the Court of Appeals adopted in that case, this Court should "look through" Section 63(12) and apply the appropriate pleading standard for the underlying claim of common law fraud, which is CPLR 3016(b). This standard "may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct."

Pludeman v. Northern Leasing Sys., Inc., 10 N.Y.3d 486, 492 (N.Y. 2008) (internal citations omitted). Here, no reasonable inference can be drawn from the facts alleged in the Complaint that any of the Defendants committed fraud.

The NYAG appears to advance two fraud theories in the Complaint. The NYAG characterizes as fraudulent (1) the Defendants' sales and financing practices and (2) the Defendants' marketing and advertising practices. *See* Compl. ¶¶ 146-48. Both theories are baseless and, as a matter of law, neither the Defendants' sales and financing practices nor their advertising is fraudulent.

First, the NYAG alleges that "the defendants evidenced a clear intent to deceive service members as to the value of the goods sold and the terms of and parties to the financing contracts." Compl. ¶ 146. Presumably this allegation references the "hidden interest" theory conjured up to support the NYAG's usury claims. It is not fraudulent for a retailer to charge more for a product than the retailer paid for it. Indeed, the only way any retail business typically can cover its expenses is by "marking up" the products it sells. As the United States Court of Appeals for the Seventh Circuit stated, "since when is the failure to disclose the precise difference between wholesale and retail prices for any commodity 'fraud'? . . . Neiman Marcus does not tell customers what it paid for the clothes they buy, nor need an auto dealer reveal rebates and incentives it receives to sell cars." *In re Mex. Money Transfer Litig.*, 267 F.3d 743, 749 (7th Cir. 2001). There is nothing misrepresentative about charging a retail price for a product that is higher than its wholesale cost.

Second, the NYAG alleges that "Defendants intentionally cultivate good will with the servicemembers by highlighting purported connections to the military in their efforts to defraud the consumers." Compl. ¶ 147. These allegations are similarly baseless. "Cultivat[ing] good will"

with potential customers is not fraudulent; indeed, it is an obvious and entirely justifiable purpose of every marketing and advertising campaign by every for-profit business on the planet. While the NYAG denigrates the Defendants' ties to the military as if they are part of a fraudulent scheme, Compl. ¶ 147, those allegations have no basis in fact; they also are belied by allegations elsewhere in the Complaint. Compl. ¶ 26 ("Harris prominently advertises that the company's founder, Jerome Harris, was a World War II Marine veteran."). Marketing or catering to a specific demographic does not transform advertising strategies into something fraudulent or deceptive. Count Five should be dismissed because it fails to state a cognizable legal claim.

D. Count Six Must be Dismissed Because the Complaint Fails to State a Cause of Action for Deceptive Business Practices

To allege a cause of action under GBL § 349, the NYAG must show that "the false, deceptive or misleading representations at issue are '[l]ikely to mislead a reasonable consumer acting under the circumstances.'" *People v. Coalition Against Breast Cancer, Inc.*, 40 Misc. 3d 1228(A) (Table), 2013 N.Y. Misc. LEXIS 3583, at *29 (Sup. Ct., Suffolk County May 2, 2013), *aff'd* 22 N.Y.S.3d 562 (2d Dept 2015) (citing *People v. Applied Card Sys. Inc.*, 805 N.Y.S.2d 175 (3d Dept 2005) (quoting *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 26 (N.Y. 1995))). The relevant inquiry – that is, whether conduct is "likely to mislead a reasonable consumer acting reasonably under the circumstances" – is "an objective one, which . . . may be resolved as a matter of law on a motion to dismiss." *Kommer v. Bayer Consumer Health*, 252 F. Supp. 3d 304, 310-11 (S.D.N.Y. 2017).

In Count Six, the Complaint alleges that the Defendants engage in deceptive trade practices by marking up the price of the jewelry, deceiving consumers by purporting to offer credit repair services, and deceiving consumers through their marketing and advertising programs, relying heavily on the same dubious theory of "hidden interest," which is faulty for the reasons already

explained. *See* Compl. ¶ 154. First, there is no "hidden interest," as noted above. Second, the Complaint does not – and cannot – point to even one incomplete, inaccurate or omitted disclosure, the absence of which would deceive a reasonable consumer. "There can be no claim for deceptive acts or practices" where, as here "the alleged deceptive practice was fully disclosed." *Watts v. Jackson Hewitt Tax Serv.*, 579 F. Supp. 2d 334, 346 (E.D.N.Y. 2008). For example, there can be no violation of GBL § 349 where there is "no allegation that [the plaintiff] paid a dime more for her hotel room than she was first informed and then charged by [the defendant]." *Chiste v. Hotels.com L.P.*, 756 F. Supp. 2d 382, 405 (S.D.N.Y. 2010). In contrast, Harris fully discloses the retail price of the jewelry available for purchase, as well as any applicable interest, tax, shipping and handling, and other fees, as explained above.

As the court in *Chiste* made clear, a defendant business does not need to disclose to its customers the fact that it is making a profit on its transactions. Rather, "G.B.L. § 349 requires that the alleged deceptive act be likely to mislead a *reasonable* consumer acting *reasonably* under the circumstances. Any reasonable consumer would understand that businesses are in business to make a profit." *Id.*

E. Count Seven Must Be Dismissed Because it Fails to State a Cause of Action pursuant to General Business Law § 458-h

The NYAG alleges that Defendants are a "credit services business" because of their "business practices, procedures, and marketing materials." Compl. ¶ 159. But the plain words of the statutory definition do not support this claim. Pursuant to GBL § 458-b, a "credit service business" is defined as:

> ...any person who sells, provides or performs, or represents that he can or will sell, provide or perform, a service for the express or implied purpose of improving a consumer's credit record, history or rating or providing advice or assistance to a consumer with regard to the consumer's credit record history or rating in return for the payment of a fee.

GBL § 458-b. Harris does not perform credit repair services "in return for the payment of a fee." *Id.* Harris sells jewelry, in return for which, customers pay the retail price, sales tax, and other fees. Harris also enables its customers to finance the purchase of that jewelry. In contrast, businesses such as the aptly-named defendant in *People v. CSA-Credit Solutions of America*—which "charge[] a fee to assist heavily indebted consumers by setting up a payment plan and negotiating directly with creditors to settle credit card and unsecured debts with a substantial reduction"—are "credit service business[es]" within the meaning of the statute. *See People v. CSA – Credit Solutions of Am., Inc.*, No. 401225/09, 2012 N.Y. Misc. LEXIS 2090, at *7 (Sup. Ct., N.Y. County Apr. 30, 2012). Harris does not perform any of these activities, and the fact that military members ultimately may improve their credit by financing their jewelry purchases does not convert Harris into a "credit services business."

But even if Harris was considered a "credit service business," its practices as alleged do not constitute deceptive acts under GBL § 458-h(1), which prohibits a credit services company from "misrepresent[ing] directly or indirectly . . . the nature of services to be performed; the time within which services will be performed; the ability to improve a consumer's credit report or credit rating; the amount or type of credit a consumer can expect to receive as a result of the performance of the services offered; the qualifications, training or experience of its personnel." GBL § 458-h(1); Compl. ¶ 160. The Complaint fails to allege that any Defendant has conducted any such deceptive actions. Instead, the Complaint conclusorily asserts that "Defendants' sales tactics, presentation, and marketing related to the 'Harris program' constitutes deceptive acts pursuant to GBL § 458-h by directly and indirectly misrepresenting the 'Harris program' to servicemembers." Compl. ¶ 161. It does not allege, for example, that Harris offers to reduce or settle a customer's outstanding debt within a certain amount of time, but then fails to do so. *Cf. Credit Solutions of*

Am., Inc., 2012 N.Y. Misc. LEXIS 2090, at *7. Rather, the Complaint asserts only that Harris advertises the benefits of building good credit. *See* Compl. ¶¶ 54-61. There is nothing deceptive about this claim. Similarly, the Complaint alleges that the amount of credit available to servicemembers is based "exclusively on their branch of service and the amount of time they have remaining on the term of enlistment, and the 'category' of merchandise purchased." Compl. ¶ 62.

For these reasons, Count Seven should be dismissed because none of the Defendants is a credit service business as defined by GBL 458-h, and because the Complaint fails to allege facts sufficient to state a cause of action for a violation of the statute.

F. Count Eight Must Be Dismissed Because It Fails to State a Cause of Action

Count Eight must be dismissed because the Complaint fails to state a cause of action for a violation of Executive Law 7-A, which relates to the solicitation and collection of funds for charitable purposes. Here, the Complaint avers false facts in an effort to support its non-existent claim. For example, the Complaint states: "At all relevant times, none of the defendants have been registered in the State of New York as a charitable organization or to fundraise for charitable organizations." Compl. ¶ 53. That allegation is simply false. Harris' current commercial co-venture fully complies with Executive Law 7-A.

Regardless, commercial co-venturers are not required to register in the State of New York. Section 173-a(1) requires a "professional fund raiser or fund raising counsel" to file written contracts with the state, but does not impose filing obligations on commercial co-venturers. N.Y. EXEC. § 173-a. Similarly, Section 173-a(4) imposes filing obligations on the charitable organization, but again does not make any such requirements on the commercial co-venturers. *Id.*

Moreover, the NYAG groups all of the Defendants together in attempting to allege a violation of Executive Law 7-A. But by the Complaint's own admissions, that grouping is

inappropriate. For example, the Complaint states "When a for-profit business partners with a charitable organization to sell products for the benefit of the charity, it is known as a 'commercial co-venture.'" Compl. ¶ 42. Clearly, none of the individual defendants is "a for-profit business," but the Complaint fails to make any such distinction between the corporate defendants and the individual defendants. Inexplicably, the Complaint treats allegations of failing to register with the state, failing to execute a contract, or failing to provide accountings as if they apply equally to the corporate and individual defendants. Not only is that conclusion inconsistent with the statutory text, but it is also inconsistent with the NYAG's own characterization of the statute.

The Complaint also implies that the Defendants committed fraud in their alleged commercial co-venture with Operation Troop Aid, suggesting that the Defendants fraudulently solicited funds on behalf of Operation Troop Aid but failed to actually remit those proceeds to Operation Troop Aid. Compl. ¶ 36, 52. But the NYAG never actually alleges that the Defendants did not give the money raised from Operation: Teddy Bear to Operation Troop Aid (nor can it).

Nor does the NYAG allege that any of the Defendants "willfully" violated Executive Law § 173. While the Complaint threatens that a willful violation of that section can constitute a misdemeanor offense, there is nothing in the Complaint that even comes close to alleging that any of the Defendants did, in fact, willfully violate the statute. *See* Compl. ¶ 169. Instead of alleging factual conduct, the Complaint simply recites excerpts of the statute. *See* Compl. ¶¶ 169-71. Because it is devoid of any factual allegation that would suggest that any Defendant willfully violated Section 173, Count Eight should be dismissed.

III. The Complaint Must Be Dismissed As To the Individual Defendants, Consumer Growth Partners, and the Out-of-State Corporate Defendants.

The Complaint fails to allege any facts—let alone facts sufficient to state a cause of action—relating to the conduct of the individual defendants, Consumer Growth Partners, or the out-of-state corporate defendants. In addition, with respect to all of the out-of-state parties, both corporate and individual, the Complaint fails to allege any factual ties to New York sufficient to permit the Court to exercise personal jurisdiction over them. Therefore, all of these Defendants should be dismissed pursuant to CPLR 3211(a)(7), (a)(8), or both.

A. Individual Defendants

1. The Complaint Fails To State A Cause of Action As To The Individual Defendants

The Complaint names as defendants CEO John Zimmermann and board members Susan Harris, Beverly Harris, Sandi Harris-Pleeter, Richard Baum, and David Malane. *See* Compl. ¶¶ 12-17. The Complaint should be dismissed as to all individual Defendants pursuant to CPLR 3211(a)(7) because, to the extent the Complaint alleges any conduct at all by these individuals, it utterly fails to allege any unlawful conduct by them. The law is clear that "'[a] director or officer of a corporation does not incur personal liability for its torts merely by reason of his [or her] official character.'" *North Shore Architectural Stone, Inc. v. Am. Artisan Constr., Inc.*, 61 N.Y.S.3d 627, 629 (2d Dept 2017) (quoting *Greenway Plaza Off. Park-1 v. Metro Constr. Servs.*, 771 N.Y.S.2d 532, 533 (2d Dept 2004) (internal quotation marks omitted)). Therefore, a director or officer cannot be liable for torts "'attributable to the corporation if he [or she] did not participate in and was not connected with the acts in any manner.'" *Id.* (quoting *PDK Labs, Inc. v. G.M.G. Trans. W. Corp.*, 957 N.Y.S.2d 191, 195 (2d Dept 2012) (internal quotation marks omitted)). Moreover, "a corporate officer is not subject to personal liability for actions he took in furtherance of the corporation's business in the absence of any indication that such officer intended to assume

personal liability for the acts of his corporation." *Cole v. Apollo Bldrs. LLC*, No. 655059-16, 2018 N.Y. Misc. LEXIS 2602, at *10 (Sup Ct., N.Y. County June 22, 2018) (citing *Worthy v. New York City Housing Authority*, 799 N.Y.S.2d 518 (1st Dept 2005)).

In this case, the Complaint pleads no facts averring specific wrongdoing by any of the individual defendants; indeed, there are no such facts. The Complaint is equally devoid of any allegation that any of the individual defendants intended to assume personal liability for any actions that they may have taken. Rather, the NYAG's action against the individual defendants hinges on the overly broad allegation that the individual defendants have "had substantial involvement and control over the business operations of the defendants" – but this is insufficient to impose liability on the individual defendants. *See e.g.*, *Cole*, 2018 N.Y. Misc. LEXIS 2602.

2. The Court Lacks Jurisdiction Over Defendants Harris-Pleeter and Malane

The Complaint must also be dismissed as to defendants Harris-Pleeter and Malane pursuant to CPLR 3211(a)(8) because they are not citizens of New York,[11] and the Complaint does not allege that they have committed any actions that would bring them within the personal jurisdiction of New York courts. In *Shaffer v. Heitner*, 433 U.S. 186 (1977), the United States Supreme Court rejected the contention that merely accepting a position as an officer or director of a corporation incorporated in a given state constituted "'purposeful[] avail[ment] of the privilege of conducting activities within the forum State'" sufficient to render such an officer or director subject to personal jurisdiction in that state. *Shaffer*, 433 U.S. at 215-16 (quoting *Hanson v. Deckla*, 357 U.S. 235, 254 (1958)).[12] Thus, defendants Harris-Pleeter and Malane are not within the personal jurisdiction

[11] The Complaint acknowledges that Harris-Pleeter is a resident of New Jersey. *See* Compl. ¶ 15. Meanwhile, although the Complaint asserts that Malane is a resident of New York, *see* Compl. ¶ 17, he is a resident of Connecticut.

[12] In *Shaffer*, the Court held that the exercise of jurisdiction by the corporation's state of incorporation, Delaware, over individual corporate officers and directors who themselves had "simply had nothing to do

of the Court. The Complaint does not plead – cannot plead – that these defendants have specifically engaged in conduct that would bring them within the reach of New York's long-arm statute, CPLR 302.

B. The Complaint Fails to State A Cause of Action As To Consumer Growth Partners

The Complaint against Consumer Growth Partners ("CGP") should be also dismissed pursuant to CPLR 3211(a)(7). The Complaint incorrectly alleges that CGP "has had an investment stake in the Harris and/or Consumer Adjustment defendants since at least October 2014." Compl. ¶ 11. In fact, CGP has never had an "investment stake" or any other financial interest in any of the Defendants.[13] Nor has CGP "engaged in the carrying on, conducting, or transacting of business" for any of the Defendants. Compl. ¶ 11. In fact, the only allegation connecting CGP to Harris is that Defendant Richard Baum is both the founder and managing partner of CGP and also the chairman of the Harris board. And even if the Complaint's allegations regarding CGP's financial interest in the Defendants were correct (which they are not), these allegations provide an insufficient nexus, and fail to allege a sufficient level of control asserted by CGP over Harris, to impose liability on CGP. "Control through the ownership of shares does not fuse the corporations [for the purposes of corporate liability], even when the directors are common to each." *Lowendahl v. Baltimore & O.R. Co.*, 247 A.D. 144, 155 (1st Dept 1936) (quoting *Kingston Dry Dock Co. v. Lake Champlain Transp. Co.*, 31 F.2d 265 (1929)). Accordingly, the Complaint must be dismissed as to CGP.

with the State of Delaware" was "inconsistent" with the "constitutional limitation on state power" imposed by the Due Process Clause of the Fourteenth Amendment. *Shaffer*, 433 U.S. at 216–17.

[13] The NYAG is well aware of the ownership structure of Harris from the thousands of pages produced during the course of the two-year investigation.

C. Out-of-State Corporate Defendants

1. The Complaint Fails To State A Cause of Action As To The Out of State Corporate Defendants

The Complaint should be dismissed pursuant to CPLR 3211(a)(7) as to each of the following defendants: Harris Originals of California, Inc.; Harris Originals of CO, Inc.; Harris Originals of Colonial Heights VA, Inc.; Harris Originals of Columbiana SC Inc.; Harris Originals of El Paso TX Inc.; Harris Originals of FL., Inc.; Harris Originals of Freedom Village NC Inc.; Harris Originals of GA., Inc.; Harris Originals of IL., Inc.; Harris Originals of Jacksonville, N.C., Inc.; Harris Originals of Killeen, TX, Inc.; Harris Originals of KS Inc.; Harris Originals of N. C., Inc.; Harris Originals of Newport News, VA, Inc.; Harris Originals of No. Illinois Inc.; Harris Originals of Norfolk, VA, Inc.; Harris Originals of Oceanside, CA., Inc.; Harris Originals of Pearlridge HI Inc.; Harris Originals of San Antonio, TX., Inc.; Harris Originals of San Diego, Inc.; Harris Originals of Savannah GA Inc.; Harris Originals of Texas, Inc.; Harris Originals of TN., Inc.; Harris Originals of VA., Inc.; Harris Originals of WA Inc.; Harris Diamond Company of N.C., Inc.; Harris Jewelry & Electronics; and Oomph, Inc. (hereinafter the "Harris Store Defendants").

The Complaint names these defendants[14]—each of which is separately incorporated in a state other than New York—without any allegation that any of these stores has ever transacted business in New York or is subject to New York laws. Rather, the Complaint alleges incorrectly

[14] As the NYAG knows from its investigation, several of the defendants named in the Complaint are stores that are no longer in operation. For example, Harris Originals of California, Inc., Harris Originals of Oceanside, CA, Inc., and Harris Originals of San Diego, Inc. are all former Harris stores that closed in 2015, as the NYAG is aware from its investigation. Additionally, Harris Originals of Norfolk, VA, Inc. is not even an active corporation, as evidenced by the Commonwealth of Virginia Secretary of State website. Baker Affirmation, at Ex. 2. Similarly, Harris Diamond Company of N.C., Inc. is simply the previous legal name of Harris Originals of N. C., Inc., evidenced by the North Carolina Secretary of State website, and Harris Jewelry & Electronics is an inactive assumed name according to the Illinois Secretary of State website. *Id.* at Exs. 3, 4.

that these entities "are current or former foreign corporations and alter-egos of Defendant Harris Originals of NY., Inc., and operations are coordinated and directed from the business offices at 800 Prime Place, Hauppauge, NY." Compl. ¶ 7. But this is not accurate and the Complaint avers no facts that support such a conclusion.

2. The Court Lacks Jurisdiction As to the Harris Store Defendants, Each of Which Is Out-of-State

The Complaint also must be dismissed as to out of state corporate defendants pursuant to CPLR 3211(a)(8), because it fails to allege sufficient facts that could support the NYAG's apparent alter-ego theory. "Where the challenged complaint lacks 'this causative element—i.e., the use of domination to cause the injury... [it should] result[] in the dismissal of the corporate veil-piercing allegation.'" *CSX Transp., Inc. v. Filco Carting Corp.*, No. 10 CV 1055, 2011 U.S. Dist. LEXIS 74625, at *10 (E.D.N.Y. July 11, 2011) (quoting *EED Holdings v. Palmer Johnson Acquisition Corp.*, 228 F.R.D. 508, 513 (S.D.N.Y. May 19, 2005)); *see also White v. Nat'l Home Prot., Inc.*, No. 09 Civ. 4070, 2010 U.S. Dist. LEXIS 40414, at *14 (S.D.N.Y. Apr. 21, 2010) (dismissing complaint where "plaintiff makes no such allegation [of causation], contending solely that the corporation—as a corporation—perpetrated a fraud. Such allegations do not warrant veil piercing.")).

The Second Circuit Court of Appeals has held that, under New York law, the "*alter ego* theory" is "indistinguishable" from New York's test for piercing the corporate veil, such that the two "should be treated as interchangeable." *Wm. Passalacqua Builders v. Resnick Developers S.*, 933 F.2d 131, 138 (2d Cir. 1991). Thus, in order to exercise jurisdiction over these out-of-state defendants pursuant to an alter ego theory, the NYAG must have alleged facts sufficient to support a finding under New York's "three-factor rule" for piercing the corporate veil, which requires:

> the parent corporation must at the time of the transaction complained of: (1) have exercised such control that the subsidiary "has become a mere instrumentality" of the parent, which is the real actor; (2) such control [must have] been used to commit fraud or other wrong; and (3) the fraud or wrong [must have resulted] in an unjust loss or injury to plaintiff.

Id. (quoting *Lowendahl*, 247 A.D. at 157). The Complaint also fails to allege facts sufficient to find that any of these defendants is a "dominated corporation." It fails to plead that there are indicia of corporate dominance, including a failure to plead any of the following:

> (1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, *i.e.*, issuance of stock, election of directors, keeping of corporate records and the like, (2) inadequate capitalization, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes, (4) overlap in ownership, officers, directors, and personnel, (5) common office space, address and telephone numbers of corporate entities, (6) the amount of business discretion displayed by the allegedly dominated corporation, (7) whether the related corporations deal with the dominated corporation at arms length, (8) whether the corporations are treated as independent profit centers, (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group, and (10) whether the corporation in question had property that was used by other of the corporations as if it were its own.

Passalacqua Bldrs., 933 F.2d at 139.

Here, these factors militate against a finding that the NYAG has sufficiently alleged that the Harris Store Defendants are mere alter egos of Harris. For example, there is no allegation that any of the Harris Store Defendants suffer from inadequate capitalization, nor that funds are put in or taken out for personal rather than corporate purposes. Moreover, as the NYAG well knows, the Harris Store Defendants operate out of different retail locations and offices, have separate addresses and telephone numbers, as well as their own employees. The Complaint does not – and cannot – allege otherwise.

Furthermore, New York courts have stressed that, "[w]hile complete domination of the corporation is the key to piercing the corporate veil . . . such domination, standing alone, is not enough; some showing of a wrongful or unjust act toward plaintiff is required." *Morris v. New*

York State Dep't of Taxation & Fin., 82 N.Y.2d 135, 141-42 (N.Y. 1993) (citing *Matter of Guptill Holding Corp. v. State of New York*, 33 A.D.2d 362, 365 (3d Dept 1970), *aff'd sub nom Guptill Holding Corp. v. State*, 31 N.Y.2d 897 (N.Y. 1972); *Lowendahl*, 247 A.D. at 157; *Passalacqua Bldrs.*, 933 F.2d at 138). In this case, the Complaint fails to allege any corporate domination, let alone a connection between Harris's alleged control over the Harris Store Defendants and any alleged injuries.

The Complaint does not adequately plead any alter ego theory, and for this reason, too, the Harris Store Defendants should be dismissed.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the Court dismiss the Complaint with prejudice.

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Respectfully submitted,

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