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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE BY CUOMO & C.,

Respondent,

-against-

No. 63

GREENBERG, ET AL.,

Appellants.

20 Eagle Street
Albany, New York 12207
May 28, 2013

Before:

ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUSTICE WILLIAM F. MASTRO, APP. DIV. SECOND DEPT.

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Official Court Transcriber

1 JUDGE GRAFFEO: Number 63, People of the State
2 of New York by Cuomo against Greenberg.

3 Counselor, do you wish to reserve any time for
4 rebuttal?

5 MR. BOIES: Five minutes, Your Honor.

6 JUDGE GRAFFEO: Granted. You can proceed.

7 MR. BOIES: Thank you, Your Honor.

8 May it please the court, my name is David Boies,
9 and I represent the appellant, Mr. Maurice Greenberg.

10 We moved for summary judgment in the trial
11 court, and we moved for summary judgment on two grounds in
12 addition to our allegation that there was not adequate
13 evidence to set forth the underlying claims that were
14 charged. First, with respect to damages, we said this
15 action was preempted by federal law.

16 JUDGE GRAFFEO: Do we still have preemption in
17 front of us, as far as you're concerned?

18 MR. BOIES: I don't believe we do, Your Honor.
19 I believe that's over with because they've withdrawn the
20 damage claim.

21 JUDGE GRAFFEO: Okay. So what's the second
22 issue?

23 MR. BOIES: The second thing we said was that
24 there was no basis for injunctive relief. In their
25 original complaint, they had had both a claim for

1 injunctive relief and a claim for damages.

2 JUDGE GRAFFEO: They do mention - - - they do
3 mention injunctive relief in the complaint, correct?

4 MR. BOIES: Yes, they do, Your Honor.

5 JUDGE GRAFFEO: Now - - -

6 MR. BOIES: Not - - - not actually the
7 injunctive relief that they're now claiming, but they do
8 mention injunctive relief in the complaint. So when we
9 moved - - -

10 JUDGE GRAFFEO: So do you - - - do you dispute
11 that in a - - - in an appropriate case that the Attorney
12 General, under the Martin Act, could pursue equitable
13 relief?

14 MR. BOIES: No, Your Honor, we do not. In fact,
15 we said to the trial court that in an appropriate case
16 there could be injunctive relief sought on a - - -

17 JUDGE GRAFFEO: So why is it inappropriate here?

18 MR. BOIES: Because, Your Honor, we moved for
19 summary judgment. We said there is no basis in this case
20 for injunctive relief. We said - - -

21 JUDGE SMITH: So you're saying there never was a
22 basis for injunctive relief or there - - - or there isn't
23 now?

24 MR. BOIES: Well, when we moved for summary
25 judgment, we said there was no basis ever and we said

1 there was particularly no basis then, and the reason for
2 those two different arguments, Your Honor, is in order to
3 get injunctive relief, they must show either some danger
4 of continuing violation or they must show some ability to
5 ask for disgorgement or restitution.

6 JUDGE SMITH: There's a general rule, if the - -
7 - if the Attorney General shows that a defendant has
8 committed some outrageous violation of the Martin Act,
9 shouldn't he normally get an injunction against repetition
10 of the - - - of the wrong?

11 MR. BOIES: Only if there is some danger that it
12 could be repeated, Your Honor. This - - - this - - -

13 JUDGE SMITH: Well, I understand that, but can't
14 - - - can't that danger usually be inferred by the - - -
15 by committing a willful - - - from the commission of a
16 willful violation?

17 MR. BOIES: Remember, Your Honor, there was no
18 evidence here of a willful violation.

19 JUDGE SMITH: Okay, but - - -

20 MR. BOIES: The whole theory here - - -

21 JUDGE GRAFFEO: But you have issues of fact in
22 the CAPCO situation, correct?

23 MR. BOIES: No, Your Honor. Even with respect
24 to CAPCO and with respect to GenRe, the theory below was
25 that you did not need scienter, you did not need a willful

1 violation. What the court ruled is the court prevented us
2 from having certain discovery because the court said
3 scienter is not an issue here. So I - - - I would say
4 that under those circumstances, you do need to have a
5 basis.

6 But in addition to that, Your Honor, by the time
7 we made our motion for summary judgment, we had a
8 situation in which there already had been an injunction
9 issued with the SEC, and we said, there is no basis for
10 restitution, there's no basis for disgorgement because
11 there was never any illegal gains. We said there's no
12 danger of a repetition; there already is an injunction.
13 So we said there that there was no basis. Now, that could
14 - - -

15 JUDGE SMITH: Grant - - - granting that you said
16 all this, did - - - has any - - - until the damage case
17 went away, every - - - the - - - no one's been paying much
18 attention to the injunctive side of this case. Is that a
19 fair statement?

20 MR. BOIES: Well, Your Honor, we were paying
21 attention to it.

22 JUDGE SMITH: Well, okay, and every - - - and
23 everyone including both courts below ignored you?

24 MR. BOIES: No. The reason - - - the reason
25 that they didn't address it was they didn't dispute it.

1 They never put forward something contrary to our
2 arguments. In other words, when we said there is no
3 danger of a continuing violation, there's no basis for
4 restitution - - -

5 JUDGE SMITH: But nobody - - -

6 MR. BOIES: - - - they didn't say - - -

7 JUDGE SMITH: But nobody ever dismissed the
8 injunctive branch of the case.

9 MR. BOIES: Well, that was what we were asking
10 for in our summary judgment.

11 JUDGE SMITH: And you didn't get it.

12 MR. BOIES: We did not get it, but we didn't get
13 it not based on the fact that there was a basis for
14 injunctive relief; we didn't get it because they said
15 there was a basis for damages. The only - - -

16 JUDGE SMITH: Well, basically - - - but isn't
17 that - - - well, that's what I was suggesting. Everyone's
18 focusing on the - - - on the damages issue, and every - -
19 - and even despite the fact that you would mention it now
20 and then, nobody paid much attention to the injunction.

21 MR. BOIES: Your Honor, with respect, I just
22 don't think that's so, okay, because we argued, and we - -
23 - we argued - - - if you look at the record at 14777,
24 14780, 14933, we argued in the trial court, we argued in
25 our Appellate Division brief appealing the grant, in part,

1 of the plaintiff's motion for summary judgment, page 4.

2 JUDGE SMITH: Your - - - your position is you
3 argued it, they didn't oppose it; nevertheless, no court
4 dismissed that part of the case. And I'm suggesting isn't
5 - - - on your theory, that has to be an oversight because
6 no one was paying attention since your motion was
7 essentially unopposed as to the injunctive point.

8 MR. BOIES: Let me try a slightly different way,
9 if I could, Your Honor. It's not that there's this part
10 of the case and that part of the case. What it is is
11 they've got a claim, and what we said is that that claim
12 we deserve summary judgment on; because there are only two
13 ways for them to justify that claim. One is damages and
14 one is injunctive relief. We said they have not put a
15 basis in the record for either of those two legs.

16 JUDGE ABDUS-SALAAM: Counsel, normally, when you
17 move for summary judgment and it's not opposed, you
18 usually win on that argument, don't you, when you're
19 arguing and there's no opposition?

20 MR. BOIES: By you see, they did oppose, on the
21 grounds that they could get damages. In other words - - -

22 JUDGE ABDUS-SALAAM: How does that relate to the
23 injunctive relief though?

24 MR. BOIES: Because there is a - - - a claim
25 there for a violation of the Martin Act. You can have a

1 claim for a violation of the Martin Act if you can seek
2 either or both, of damages or injunctive relief. We said
3 there is no basis under either theory. That is, we asked
4 for summary judgment not of damages, not of injunctive
5 relief; we asked for a summary judgment on their whole
6 claim.

7 JUDGE ABDUS-SALAAM: And when you didn't get it,
8 you didn't move to reargue or to clarify or do anything of
9 that sort, did you, on the injunctive relief?

10 MR. BOIES: No, because we didn't have to
11 because the court didn't decide against us on that ground.

12 JUDGE GRAFFEO: Well, let - - - let me ask you
13 another way. What - - - what is there in the federal
14 settlement that would eliminate the need for the Attorney
15 General to pursue the injunctive relief here?

16 MR. BOIES: There is - - -

17 JUDGE GRAFFEO: I mean, especially in terms of
18 the possibility of repetition.

19 MR. BOIES: Sure. There is a very broad
20 injunction that was agreed to in connection with the SEC.

21 JUDGE GRAFFEO: That does - - - that was what?
22 I guess that's what I'm asking more specifically.

23 MR. BOIES: That - - - that agrees that - - -

24 JUDGE GRAFFEO: Are - - - are both of these
25 individuals banned from ever participating in securities

1 industry again?

2 MR. BOIES: No, they're not, Your Honor, and
3 that's a very important aspect of it, okay.

4 JUDGE GRAFFEO: So is that something the
5 Attorney General is entitled to pursue?

6 MR. BOIES: Not now. And the reason I say not
7 now, Your Honor, is because they did not ask for it in
8 their complaint; they did not ask for that in their
9 complaint. They did not ask for it in the trial court.
10 They didn't preserve it in the Appellate Division. This
11 is a situation in which they have never been seriously
12 pursuing injunctive relief. They abandoned it in the
13 trial court. They abandoned it in - - - in the Appellate
14 Division. They did not preserve that argument. They
15 never asked for this kind of relief even in their
16 complaint. And now, because - - -

17 JUDGE SMITH: I - - - I assume that the
18 complaint - - - I assume the complaint does say other and
19 further relief?

20 MR. BOIES: I - - - I'm sure it does, Your
21 Honor, but it's - - - it - - - it says injunctive relief
22 in the - - - in the general category that they won't do
23 this kind of violation again, which is - - -

24 JUDGE SMITH: Which you say they've already got
25 or somebody's already got.

1 MR. BOIES: In the SEC.

2 JUDGE READ: What - - - what if we don't agree
3 with you? What happens to the case? Does it go back to
4 Supreme Court?

5 MR. BOIES: Well, Your Honor, you recall that in
6 addition to the injunctive relief argument on the grounds
7 that there's nothing left after they abandon their damages
8 claim, we have pointed out, and as the dissent pointed out
9 in the Appellate Division, that there is no admissible
10 evidence that supports any violation here at all.

11 JUDGE READ: That gets back to your evidentiary
12 point about whether or not there was anything in
13 admissible form in opposition to the - - - could you - - -
14 could you address that for a little bit?

15 MR. BOIES: Yes, Your Honor. As this court held
16 in 2004 in Hyman against Queens Bancorp, 3 N.Y. 3d, I
17 think 743, you have to have admissible evidence in order
18 to oppose a summary judgment. In fact, if I can get the
19 exact quote, it says, "A party opposing a motion for
20 summary judgment must produce admissible evidence
21 sufficient to require a trial on material questions of
22 fact upon which the claim rests."

23 JUDGE SMITH: There's an exception, isn't there,
24 when the - - - when the opposing party shows a sufficient
25 excuse for not having admissible evidence?

1 MR. BOIES: In - - - in an earlier case, a case
2 that preceded the Hyman case - - -

3 JUDGE SMITH: I mean, as a general rule, you'd
4 admit that - - - let's say you don't have admissible
5 evidence because one of the witnesses who you would need
6 to support your - - - the key witness is taking the Fifth
7 Amendment, and if it's foreseeable that maybe that - - -
8 maybe the criminal matter would be resolved and he might
9 not take the Fifth Amendment, would that be a sufficient
10 excuse to justify denying summary judgment?

11 MR. BOIES: I - - - I think, Your Honor, in some
12 - - - some places it could be. In Friends of Animals v.
13 Associated Fur Manufacturers, a 1979 case, this - - - this
14 court held that if someone could "demonstrate acceptable
15 excuse for his failure to meet the strict requirement of
16 tender in admissible form, you might be able to avoid" - -
17 -

18 JUDGE SMITH: Well, in - - - in this case - - -
19 in this case, can we - - - I mean, is it - - - I don't
20 even know if your adversary is arguing this, but can't - -
21 - can they say, look, we don't have Ferguson and Milton
22 but we can't say we're never going to have them. They - -
23 - their problems could be resolved.

24 MR. BOIES: Well, Your Honor, I - - - I suggest
25 that under Friends of Animals and all the other cases,

1 it's got to be more than sort of speculation or conjecture
2 that says maybe we could get it.

3 JUDGE SMITH: Okay. You're almost out of time,
4 so let me switch, if I can, for a moment, why is it - - -
5 forget about the hearsay problem. Why isn't it enough
6 that you have the boss of the company who originated the
7 transaction, can't - - - is it - - - can't a jury infer or
8 isn't - - - for a summary judgment, isn't the inference a
9 possible one that the - - - that his subordinates didn't
10 do a crooked deal without asking him?

11 MR. BOIES: Well, Your Honor, if that were the
12 case, somebody who is running a 160-billion-dollar
13 corporation with thousands of these transactions - - -

14 JUDGE SMITH: Yeah, yeah, yeah, but this is - - -
15 -

16 MR. BOIES: - - - who are responsible for every
17 month - - -

18 JUDGE SMITH: This isn't - - - this isn't
19 thousands of these transactions. This is a transaction
20 that he called up Mr. Ferguson to originate.

21 MR. BOIES: Yes, but remember, Your Honor - - -

22 JUDGE SMITH: And it's a 600 - - - 600 million
23 is money even - - - even to AIG.

24 MR. BOIES: It is, but there were thousands of
25 transactions of hundreds of millions of dollars. And with

1 respect to calling up Mr. Ferguson, the evidence is
2 absolutely clear - - - it is undisputed - - - that the
3 original transaction that Mr. Greenberg asked for on
4 October 31st, 2000, was a legitimate transaction.

5 JUDGE SMITH: How come - - - why did the Second
6 Circuit conclude that a jury could - - - they could have
7 concluded that the conspiracy began on October 31st?

8 MR. BOIES: Your Honor, I - - - I don't know why
9 that was concluded, but what I - - - what I can tell you
10 is, as far as Mr. Greenberg was concerned, the evidence is
11 absolutely clear, including from Mr. Napier, their own
12 witness, the original thing that was asked for by Mr.
13 Greenberg was entirely legitimate, and they spent two
14 weeks trying to construct that.

15 JUDGE SMITH: What about - - -

16 JUDGE GRAFFEO: Well, why isn't the Attorney
17 General entitled to delve deeper into this issue to
18 determine if, in fact, there was knowledge?

19 MR. BOIES: Your Honor, they've been delving
20 into this for eight years. They've had hundreds of
21 depositions, millions of pieces of paper produced. This
22 has gone on for eight years. They have delved into these
23 transactions with greater scrutiny than anybody - - -

24 JUDGE SMITH: What about - - - what about the
25 Napier call to Milton? Napier calls Milton and says, in

1 effect, we don't want to do this the legal way; we're
2 going to do it the crooked way. Milton says, I'll get
3 back to you. Then Milton does get back to him. Couldn't
4 a fact-finder infer from that that Greenberg was informed
5 of what was going on?

6 MR. BOIES: Your Honor, I don't think so. I
7 mean, that is pure speculation and conjecture. I mean, if
8 you're going to - - -

9 JUDGE SMITH: Who - - - who would Milton
10 possibly have to check with other than Greenberg?

11 MR. BOIES: Well, there were a whole lot of
12 people that were senior who were involved in the
13 transaction. And in addition to that, he might want to
14 think about it; he might want to ask his lawyers. There
15 were all sorts of lawyers involved in this transaction on
16 both sides.

17 JUDGE RIVERA: So you're arguing the only way
18 they can oppose your summary judgment is if they actually
19 have the smoking gun?

20 MR. BOIES: No, Your Honor. There are all sorts
21 of ways. Someone might have talked to Mr. Greenberg about
22 some of the illegal aspects of the transaction. There
23 were all sorts of documents and e-mails.

24 JUDGE SMITH: Suppose - - - suppose a deal is
25 about to be closed and in the - - - in the conference room

1 where the documents are being signed, someone presents
2 essentially a crooked deal to Mr. Milton. Greenberg is
3 not in the room; Greenberg is in another conference room.
4 Milton takes a look at it, puts it down, walks out of the
5 room, comes back and signs. Could someone infer that he
6 checked with Greenberg?

7 MR. BOIES: I think if they were there together
8 and they were at nearby conference rooms, there might be
9 an inference, Your Honor. None of that is present in this
10 case. None of that has ever been argued. And indeed,
11 when you're talking about an acceptable excuse, nobody
12 said in the Appellate Division in - - - this is - - - this
13 case was entirely changed. This was - - - this was a case
14 they argued one way below. They didn't preserve the
15 arguments they're making to this court now, and what
16 they're trying to do is just somehow keep this case alive
17 so that they can delve into it more after eight years of
18 not finding anything.

19 JUDGE GRAFFEO: Counsel, you'll have your time
20 for rebuttal.

21 MR. BOIES: Thank you, Your Honor.

22 MR. SAMA: Good afternoon, Your Honors. Vincent
23 Sama for Mr. Smith.

24 I want to follow up on what you discussed with
25 Mr. Boies by focusing on this - - -

1 JUDGE GRAFFEO: Do you want any rebuttal of your
2 few minutes?

3 MR. SAMA: Yeah, one minute, please.

4 JUDGE GRAFFEO: Yes.

5 MR. SAMA: Thank you - - - by focusing on one -
6 - - this case has been going on eight years. There were
7 fifty depositions, million - - - tens of millions of - - -

8 JUDGE PIGOTT: Well, it started out - - - it
9 sound - - - you know, if you read the briefs from the very
10 beginning, it sounds like you're - - - you're suggesting
11 that the Attorney General of the State of New York has
12 absolutely no power under - - - under its blue sky laws
13 because of federal preemption. And I - - - and I agree
14 with Mr. Boies that it seems to have now bubbled down to -
15 - -

16 MR. SAMA: Correct.

17 JUDGE PIGOTT: - - - you know, a very, very
18 small - - -

19 MR. SAMA: Very - - -

20 JUDGE PIGOTT: - - - thing.

21 MR. SAMA: Correct.

22 JUDGE PIGOTT: But nevertheless, that's where we
23 are. And if you're conceding that the Attorney General
24 has certain authority under - - - are we just arguing
25 pleadings?

1 MR. SAMA: No. I am - - - I'm saying that the
2 Attorney General has a - - - they took discovery in this
3 case. But now after eight years, if you look at the
4 evidence very carefully as to what they're saying against
5 Mr. Smith, it's nonexistent. We get - - -

6 JUDGE SMITH: What - - - what about - - - what
7 about his handwriting on that e-mail?

8 MR. SAMA: That - - - what - - - he has his
9 handwriting on an e-mail. That's all that he's
10 acknowledged.

11 JUDGE SMITH: I mean, it's - - - it's an e-mail
12 - - - can the e-mail fairly be read as saying, let's do a
13 sham deal and get the fee back to us under the table?

14 MR. SAMA: I don't - - - I don't believe so. I
15 believe that's doc - - - the document that he - - - was
16 hand delivered. He's not copied on that document. It's
17 brought to him. His handwriting is on it. There's two
18 things that they're now arguing about that, that a
19 different - - -

20 JUDGE SMITH: The handwriting says let's have a
21 meeting about it.

22 MR. SAMA: Yes.

23 JUDGE SMITH: If - - - if - - - assume you do
24 read it - - - I understand you don't admit it. Assume you
25 read it - - -

1 MR. SAMA: Yes.

2 JUDGE SMITH: - - - the way I - - - the way I
3 suggested, that this e-mail - - - we're going to do a sham
4 no-risk deal and get the money back in a - - - in a phony
5 way, and he writes on it, let's have a meeting about this,
6 could you infer that he knew?

7 MR. SAMA: I - - - I would first say that that's
8 not what the e-mail says. Attached to that e-mail - - -

9 JUDGE SMITH: Okay. But I guess what you're - -
10 - you - - - I can understand you got a - - -

11 MR. SAMA: Yeah, you're saying - - -

12 JUDGE SMITH: - - - a problem with my
13 assumption, but if you made my assumption, you would admit
14 - - -

15 MR. SAMA: That that, in itself - - -

16 JUDGE SMITH: - - - that it would infer
17 knowledge?

18 MR. SAMA: If you're saying that that is
19 improper, what - - - that's not necessarily improper. He
20 has a transaction in front of him with four - - -

21 JUDGE SMITH: My question is can you infer that
22 he knew what was going on, on my - - -

23 MR. SAMA: No.

24 JUDGE SMITH: - - - on my assumption.

25 MR. SAMA: No, I don't believe so, because if

1 you follow that document forward through the rest of the
2 case, there is no communication with Mr. Smith with anyone
3 at GenRe. He does not involve an accounting. Everyone
4 who's testified, including all the DVG accountants that
5 did the accounting, that booked the transaction, that did
6 the written analysis to make their own determination that
7 this was a finite transaction, properly booked his
8 insurance.

9 JUDGE GRAFFEO: Well, is it for us to reach
10 these factual determinations - - -

11 MR. SAMA: No. My - - - the - - -

12 JUDGE GRAFFEO: - - - or is that why the
13 Attorney General should be permitted to proceed?

14 MR. SAMA: No. The point is, under - - - under
15 the Hyman case then followed by the Lynn G. v. Hugo case
16 and Alvarez here, it's the function of the - - - the rules
17 that are supposed to apply in this case is when one party
18 comes forward with admissible evidence, the other side, to
19 defeat summary judgment, has to come up - - - come back
20 with admissible - - - you can't, at this stage - - -

21 JUDGE SMITH: Well, what about - - -

22 MR. SAMA: - - - if they - - -

23 JUDGE SMITH: - - - what about the contradiction
24 between Smith and Jacobson? Smith - - - Smith says, I had
25 nothing to do with the accounting, it was Jacobson; and

1 Jacobson said, it wasn't me, it was either Smith or
2 whoever said he was going to do it.

3 MR. SAMA: Jacob - - - what Jacobson did - - - I
4 don't believe that that's exactly what Jacobson said.
5 What Jacobson said that - - - he had a - - - he learned
6 about the transaction from Mr. Smith, he discussed it. He
7 said that as - - - because it's - - - as the CFO, he
8 signed the financial statements, it's Mr. Smith; however,
9 everyone - - - everyone who looked at the transaction
10 signed off it; it was at DVG - - -

11 JUDGE SMITH: But wait a minute, wait a minute.
12 At Smith's deposition, they read him Jacobson's testimony
13 in which he says, this was not my problem, and Smith says,
14 I don't agree with that, isn't that a contradiction?

15 MR. SAMA: Right. Well, I think the fact is
16 that the DVG accountants booked the transaction. Mr.
17 Smith, by virtue of being the CFO, signed the financial
18 statements, but the fact that it had to come out of the
19 unit that booked it, did the actual insurance DVG, Mr.
20 Jacobson was the CFO of that unit, but the 10Ks has
21 disclosed that DVG would book their own; they had their
22 own accounting staff, and the people actually did it, and
23 no one who did the accounting - - - they testified in this
24 case that they did not speak to Mr. Smith about it. No
25 one spoke to Mr. Smith about it, not one person.

1 Mr. Jacobson, in his own deposition, also said
2 that he didn't speak to the people that actually did it,
3 the accounting for the transaction. What I respectfully
4 submit to you is that Mr. Jacobson was just giving that
5 testimony so he could avoid responsibility for the DVG
6 actually accounting for the transaction, what the
7 subsequent discovery indisputably proved.

8 JUDGE GRAFFEO: Your red light is on.

9 MR. SAMA: Thank you.

10 JUDGE GRAFFEO: Counsel, is this the Johnny-
11 come-lately-type situation here? It doesn't appear from
12 the record that injunctive relief was at all the focus of
13 what the Attorney General's office was seeking.

14 MS. UNDERWOOD: Injunctive relief was always
15 sought. You're right that it - - - less attention was
16 given to injunctive relief at a time when a very large,
17 enormously large - - -

18 JUDGE GRAFFEO: Was it abandoned?

19 MS. UNDERWOOD: - - - damage - - - it was never
20 abandoned. We asked for it in the complaint. We asked
21 for injunction, disgorgement, restitution, damages, such
22 other equitable relief as may be necessary and such other
23 relief as may be may be - - -

24 JUDGE SMITH: What is - - - what is the
25 equitable relief you're now asking for?

1 MS. UNDERWOOD: The equitable relief we'd asked
2 for in the first instance is an injunction - - - the
3 suggestion has been - - - there are several things that
4 might be - - - that might be enjoined.

5 JUDGE PIGOTT: What do you want?

6 MS. UNDERWOOD: We - - - we would like enjoining
7 further fraud. We would like enjoining - - -

8 JUDGE SMITH: He - - - he says you've - - - he
9 says that's already been done.

10 MS. UNDERWOOD: That's not correct. This - - -
11 the injunction - - - the consent injunction with the SEC
12 bars violating federal law, period, and - - -

13 JUDGE GRAFFEO: So - - - so what are you looking
14 to bar them specifically from doing?

15 MS. UNDERWOOD: Well, we would - - - we would
16 look to bar him from the securities industry. We would
17 look to bar him from serving as a - - - them from serving
18 as officers and directors of public companies, possibly -
19 - -

20 JUDGE GRAFFEO: Does the stat - - - does the
21 statute allow that? This - - - the Martin Act talks about
22 being prohibited from participating in the securities
23 industry, but how do you get to expand that beyond the
24 breadth of the statute?

25 MS. UNDERWOOD: The Martin Act and Executive Law

1 6312 are both fundamentally equitable in nature. They - -
2 - they created broad power in the Attorney General to seek
3 and courts to grant, in the exercise of their equitable
4 discretion, such remedies - - -

5 JUDGE GRAFFEO: Bar them working ever again?

6 MS. UNDERWOOD: Well, that might not - - - that
7 - - -

8 JUDGE GRAFFEO: - - - in any - - - in any
9 industry?

10 MS. UNDERWOOD: I wouldn't suggest that any
11 court or any Attorney General would find that to be
12 equitable. But there is - - - there is broad power to
13 determine what is necessary and appropriate under the
14 circumstances.

15 JUDGE PIGOTT: We're really down to barring
16 these two from the securities industry and being on
17 boards. We're going to trial on that? I'm looking at
18 this record. I - - - are you going to warn this jury as -
19 - - you know, what you're - - -

20 MS. UNDERWOOD: We are also pursuing the
21 possibility of disgorgement of ill-gotten gains.
22 Defendant suggests that that's not available. We would be
23 in - - - we're looking into - - -

24 JUDGE SMITH: Wait. Disgorgement? I mean, the
25 - - - I thought - - - I thought the damages issue was out

1 of the case. You're saying that's not damages?

2 MS. UNDERWOOD: That's not - - - the idea would
3 be some - - - if there is some form - - -

4 JUDGE SMITH: Did they - - - did they
5 understand, do you think, when they settled with the - - -
6 in the federal case, that - - - that you were going to ask
7 them for a few more hundred million?

8 MS. UNDERWOOD: I don't know what they
9 understood, but we have - - -

10 JUDGE SMITH: Well, you're saying - - - you're
11 saying you are.

12 MS. UNDERWOOD: We're saying we are looking. I
13 can't promise that we will be able to establish it. We
14 are entitled to attempt to determine - - - to find
15 performance-based compensation - - - that's what
16 disgorgement would be - - - performance-based compensation
17 that was effected by these frauds - - -

18 JUDGE PIGOTT: Can you - - - can you - - -

19 MS. UNDERWOOD: - - - not the damages they
20 inflicted on somebody else.

21 JUDGE SMITH: I guess - - - I guess when I heard
22 that damages were out of - - -

23 JUDGE GRAFFEO: You mean whether they got
24 bonuses?

25 MS. UNDERWOOD: Yes.

1 JUDGE GRAFFEO: Is that - - -

2 MS. UNDERWOOD: Correct.

3 JUDGE GRAFFEO: Is that what you're talking
4 about?

5 MS. UNDERWOOD: Correct.

6 JUDGE PIGOTT: And how much is that?

7 MS. UNDERWOOD: We don't - - - I can't put a
8 finger on it now, but we're entitled to pursue that.

9 JUDGE SMITH: But don't you think that maybe
10 people - - - when we heard that damages were out of the
11 case, we didn't - - - we were - - - I was sort of
12 surprised to hear that you're now asking him for money.

13 MS. UNDERWOOD: Damages are the harm done to
14 victims. We're not talking about that. This court said
15 in Applied Card - - - made clear that there's a
16 distinction between damages, which is the harm to victims,
17 which can sometimes be precluded by a federal - - - the
18 settlement of a federal class action, and disgorgement of
19 - - - of ill-gotten profit.

20 JUDGE PIGOTT: I think that was in your - - - in
21 your letters, but - - -

22 MS. UNDERWOOD: Yes, it is.

23 JUDGE PIGOTT: - - - Mr. Boies makes the point
24 that there's been eight years of discovery. Has there
25 been discovery as to how much you would be seeking in

1 terms of this disgorgement?

2 MS. UNDERWOOD: No. I think that it's - - - I
3 don't believe so. I think it's - - - first of all, about
4 the eight years, three years have been on this
5 interlocutory appeal.

6 JUDGE GRAFFEO: So have - - - so have you waived
7 some of these issues - - -

8 MS. UNDERWOOD: We - - - we have not - - -

9 JUDGE GRAFFEO: - - - then if they were not
10 dealt with in the discovery phase?

11 MS. UNDERWOOD: We have not waived issues. It
12 is conventional to look at remedies after you have
13 liability. I think that the - - - the notion that because
14 we didn't specify exactly what injunction we wanted or
15 exactly what the predicate would be means that we've
16 waived it - - -

17 JUDGE SMITH: Is there - - -

18 MS. UNDERWOOD: - - - is just mistaken.

19 JUDGE SMITH: At this - - - at this point in the
20 case, from you - - - from your point of view, isn't there
21 a symbolic aspect to it? I mean, aren't you really
22 looking for a moral victory here?

23 MS. UNDERWOOD: What we are looking for is to
24 protect the markets of New York from fraud, to hold him
25 accountable.

1 JUDGE SMITH: What - - - what's going to happen
2 to the citizens of New York if this case gets dismissed
3 that - - - that you're protecting them from?

4 MS. UNDERWOOD: I think one thing that will
5 happen to the citizens of New York is that they will see
6 that it is possible to avoid responsibility for fraud by
7 buying delay - - -

8 JUDGE SMITH: I - - - I see your point.

9 MS. UNDERWOOD: - - - by litigation delay.

10 JUDGE SMITH: I see your point, but isn't that
11 essentially a symbolic measure? You're - - - you're going
12 to show the citizens of New York these people can't get
13 away with this.

14 MS. UNDERWOOD: I'm not - - - I'm resisting
15 symbolic because I think it has an effect; I suppose
16 symbols have an effect. We're looking for a deterrent
17 effect for these people and for people who engage in
18 comparable activities. He has - - - in his consent
19 decrees, he has never acknowledged that there was a fraud,
20 much less that he was responsible for it, and so there's
21 no reason to think that he would avoid like behavior - - -

22 JUDGE GRAFFEO: That's at the heart of this,
23 isn't it - - -

24 MS. UNDERWOOD: - - - in the future.

25 JUDGE GRAFFEO: - - - that - - - that since

1 there hasn't been an admission of guilt, that's what
2 you're looking for? Is - - -

3 MS. UNDERWOOD: There's been no admission.
4 There's been no finding, and we - - - and we believe that
5 we're looking for that and for the remedies that go with
6 it, which are - - - which are the heart of what the
7 statute was about. These statutes start - - - damages
8 came late in these statutes. These statutes started as -
9 - - the principal remedy in them was injunctive relief,
10 equitable relief.

11 JUDGE PIGOTT: That's true. The - - - when this
12 case started, though, it - - - it read like - - - the
13 briefs read like there was a total assault on - - - on
14 your - - - your authority under the blue - - - our blue
15 sky laws, and that all seems to have gone away. Am I - -
16 - am I right in that assessment - - -

17 MS. UNDERWOOD: I hope so.

18 JUDGE PIGOTT: - - - that they've now - - -
19 they've now conceded all of your authority. They're
20 simply saying that what authority you have you haven't
21 properly pled, is about what we're down - - -

22 MS. UNDERWOOD: I'm not - - - I'm not going to
23 try and restate what they've said. They have - - - there
24 was a huge assault on our authority, which we - - - which
25 we thought very important to defend. They seem to have

1 limited it, though, to our authority to seek damages, the
2 damages that were obtained in the settlement of the
3 federal class action. We have withdrawn that claim, and
4 as I understand it, they've withdrawn the challenge to our
5 authority. They're now claiming something else. They're
6 claiming that the evidence doesn't warrant or the - - - I
7 guess the equities - - - the evidence doesn't warrant a
8 finding of liability.

9 JUDGE PIGOTT: We're almost down to what a 3212
10 means. In other words, is the burden of proof on - - - on
11 someone who's opposing a motion for summary judgment - - -

12 MS. UNDERWOOD: That's one of the things - - -

13 JUDGE PIGOTT: - - - or briefs on that.

14 MS. UNDERWOOD: That's one of the things we're -
15 - -

16 JUDGE RIVERA: Yes. Could you address the - - -
17 the inadmissible hearsay issue? What - - - I know that
18 you argue in your briefs that you have, apart from the
19 hearsay, sufficient admissible - - -

20 MS. UNDERWOOD: That's correct.

21 JUDGE RIVERA: - - - evidence. Could you
22 address that issue?

23 MS. UNDERWOOD: Yes. The summary judgment
24 record shows, without regard to inadmissible hearsay, that
25 AIG and GenRe created a sham reinsurance deal in order to

1 falsely inflate AIG's loss reserves and increase the price
2 of AIG stock. And Greenberg's deposition puts him in a
3 critical role in the transaction. He's the one who called
4 GenRe's CEO to initiate it. Two weeks later, he says he
5 personally negotiated and finalized its terms with
6 Ferguson.

7 JUDGE SMITH: But - - - but you - - - but you
8 concede that there's a legitimate and an illegitimate way
9 of doing it?

10 MS. UNDERWOOD: Yes.

11 JUDGE SMITH: And how do - - - how do we - - -
12 what is the evidence that he was party to an agreement to
13 do it in the illegitimate way?

14 MS. UNDERWOOD: Well, the simplest evidence is -
15 - - is that it was done in an illegitimate way, and it - -
16 - and we know that because - - -

17 JUDGE SMITH: And your - - - your theory is that
18 doesn't happen without the boss knowing?

19 MS. UNDERWOOD: That's correct. That's - - -
20 that's one piece of the - - -

21 JUDGE PIGOTT: And is - - -

22 JUDGE GRAFFEO: What transaction of this
23 dimension - - -

24 MS. UNDERWOOD: The transaction of this
25 dimension doesn't happen. And then that's true in

1 general. It's even more clearly true in this case in
2 which - - -

3 JUDGE GRAFFEO: But is that speculation - - -

4 MS. UNDERWOOD: No. It's in - - - it's a fair -
5 - -

6 JUDGE GRAFFEO: - - - then; are you asking us to
7 speculate?

8 MS. UNDERWOOD: It's a fair inference from the
9 evidence when his - - - when Greenberg's point person,
10 Milton, knew about the side arrangement, first, he - - -
11 he had the inquiry that was discussed earlier about
12 whether they would accept an illegal, nonrisk deal. Then,
13 after the conversation between Ferguson and Greenberg, for
14 which we don't have eavesdropping evidence, we have Napier
15 sending Milton a draft contract with a cover e-mail about
16 the illicit side deal.

17 JUDGE PIGOTT: Ms. Underwood, is it - - - at
18 some - - - a lot of this, when you look at it, it really -
19 - - it could be argued that they did not meet their
20 initial burden of establishing their entitlement to
21 judgment as a matter of law and therefore you did not have
22 to go forward with - - - you know, with other proof. At
23 what - - - by the time you get done reading all this, is
24 it - - - have they established as a matter of law that the
25 - - - that the two defendants here were not party to - - -

1 to all of what went on?

2 MS. UNDERWOOD: Absolutely not. The only - - -
3 either this - - - we know that this deal was done
4 fraudulently. Either it was fraudulent from the outset
5 when - - - when Mr. Greenberg proposed it - - - we don't
6 have direct evidence of that - - - or it became fraudulent
7 at some point during the working out of it. And according
8 to Greenberg, according to his deposition, Milton wouldn't
9 do that without telling him. He said, Milton - - - in
10 answer to a question, Milton wouldn't change the terms of
11 a deal in a manner that would expose us to liability for
12 fraud without telling me. I think it's a fair inference,
13 then, that he - - -

14 JUDGE RIVERA: You wouldn't hire the person who
15 went later - - - you wouldn't hire them later when you had
16 to leave AIG if they, in fact, did this on their own.

17 MS. UNDERWOOD: Exactly right. Greenberg - - -
18 the - - - there is a conceivable alternative explanation
19 that perhaps Milton and Ferguson and Napier were doing
20 this on their own and concealing it from Greenberg. A,
21 that seems entirely implausible given the - - - not - - -
22 given not just that Greenberg was the boss but given the
23 particular relationship that he testified to with Milton
24 in his deposition and - - -

25 JUDGE GRAFFEO: So if we agree with you, what

1 happens next?

2 MS. UNDERWOOD: Case goes back to trial, which
3 is where it belongs.

4 JUDGE GRAFFEO: We have another so many years of
5 discovery or is there - - -

6 MS. UNDERWOOD: I don't - - -

7 JUDGE GRAFFEO: - - - is there a trial?

8 MS. UNDERWOOD: I don't think so. There's a
9 trial. There's a - - - there may be some - - -

10 JUDGE SMITH: Are - - - are they entitled to
11 discovery on your - - - on your disgorgement theories or
12 on - - - on the need for injunctive relief? I mean, it
13 obviously hasn't been the main focus up to now. Nobody
14 bothered to take any discovery on it, practically.

15 MS. UNDERWOOD: The - - - the nature of the case
16 has changed. I don't really know how - - - that would be
17 up to the trial court, and he could certainly control the
18 scheduling of - - - of such matters.

19 JUDGE SMITH: If - - - if I could go back to a
20 detail for a moment, do you rely - - - on the issue of
21 summary judgment, I understand you say you've got plenty
22 of evidence as it is. Do you, in the alternative, rely on
23 the possibility that maybe, by the time of trial, Ferguson
24 or Milton will be available to testify?

25 MS. UNDERWOOD: That's a possibility. I would

1 all - - - yes. I would also say that - - -

2 JUDGE SMITH: What - - - what is the status of
3 their - - - of their problem, Ferguson and Milton?

4 MS. UNDERWOOD: To the best of my knowledge,
5 their convictions were overturned on evidentiary grounds,
6 and then they, I believe, have entered deferred
7 prosecution agreements of some sort. So I think their
8 matters are either disposed of or nearly so.

9 JUDGE PIGOTT: They are in a deferred - - - do
10 you know what that means in terms of their availability in
11 a - - - in a subsequent trial, this deferred - - -

12 MS. UNDERWOOD: At some point, it will mean they
13 will be - - - they will no longer have the Fifth Amendment
14 claim. I do not know, as I stand here, whether they - - -
15 whether that - - - we have reached that point at this
16 moment. I would also say that there's - - - the testimony
17 from the Connecticut trial, which they keep characterizing
18 as hearsay, is - - - is admissible on summary judgment
19 because it is compara - - - not because it's admissible at
20 trial; because like an affidavit, it is a proffer of
21 admissible testimony.

22 JUDGE SMITH: Well - - -

23 MS. UNDERWOOD: It is - - - it is the statement
24 of somebody under oath about something about which he has
25 personal knowledge. And so while their briefs keep saying

1 that the trial testimony wouldn't be admissible at that -
2 - - at this trial, and we quite agree with that, the trial
3 testimony is comparable to an affidavit which is a classic
4 - - -

5 JUDGE MASTRO: What is the significance of the
6 restatement?

7 MS. UNDERWOOD: Significance of the restatement
8 is that it admits that the transaction did not have - - -
9 it's a business record which admits that the transaction
10 did not have risk and was improperly booked. It does not
11 attribute mental culpability to anybody.

12 JUDGE SMITH: That - - - that's not really a
13 disputed point, anyway. I mean - - -

14 MS. UNDERWOOD: I hope not.

15 JUDGE SMITH: - - - they admit it was - - - they
16 admit it was a crooked deal. They just say their people
17 didn't - - - weren't involved.

18 MS. UNDERWOOD: I - - - I believe that's
19 correct. I'm not - - - you'd have to ask them whether
20 that's so. So - - - so there is - - - there is - - -

21 JUDGE GRAFFEO: What - - - what are you asking
22 us to do here?

23 MS. UNDERWOOD: To affirm the judgment of the
24 Appellate Division which affirmed the judgment of the
25 Supreme Court, denying summary judgment on this - - - on -

1 - - denying their motion for summary judgment on the GenRe
2 transaction and sending that case, therefore, back to
3 trial where it belongs.

4 JUDGE GRAFFEO: And on the - - - on the other
5 case?

6 MS. UNDERWOOD: That's not on this appeal.

7 JUDGE GRAFFEO: So we don't have - - -

8 MS. UNDERWOOD: That is - - - that is - - -

9 JUDGE GRAFFEO: We don't - - - there's no need
10 for us to address - - -

11 MS. UNDERWOOD: That's right.

12 JUDGE GRAFFEO: - - - the other transaction?

13 MS. UNDERWOOD: That is already in the trial
14 court, ready for - - - ready for trial. This would be
15 tried with that case, and the - - - and the two somewhat
16 similar sham reinsurance frauds are both ready for trial.

17 JUDGE GRAFFEO: Anything further? Thank you.

18 Mr. Boies.

19 MR. BOIES: Thank you, Your Honor.

20 Let me first address the question of whether we
21 made a prima facie case that we were entitled to judgment.
22 First, we have the testimony both of Mr. Greenberg and of
23 Mr. Smith. They were - - - Mr. Greenberg was deposed for
24 three days. He was extensively examined about this. He
25 testified that he did not engage in anything improper. He

1 testified that he did not have any knowledge of any of the
2 improprieties. He testified that what he initially sought
3 was legitimate loss portfolio transaction. In addition to
4 that, we had the testimony from numerous witnesses who
5 testified that for two weeks after Mr. Greenberg's
6 telephone conversation with Mr. Ferguson, what GenRe did
7 was they attempted to construct an entirely legitimate
8 transaction, and that's at record - - -

9 JUDGE SMITH: Well, was he asked when he first
10 found out it wasn't legitimate?

11 MR. BOIES: He never - - - he was never told
12 that it was not legitimate.

13 JUDGE SMITH: But he - - - he says today it's
14 legitimate? Do you say it's legitimate?

15 MR. BOIES: What he - - - what he said - - -
16 what he said at - - - at his deposition and what the
17 dissenting justice said in the Appellate Division is that
18 there is no proof as to whether this transaction had or
19 did not have enough risk to be qualified as insurance.
20 People talk about this as a crooked transaction, and
21 that's - - - and that's - - -

22 JUDGE SMITH: So - - - so I was wrong in my
23 question to Ms. Underwood; you don't admit that it was a
24 crooked deal?

25 MR. BOIES: We - - - we do not admit that that

1 was - - -

2 JUDGE SMITH: Do you admit there's evidence from
3 which a jury could find or a fact finder could find it was
4 a crooked deal?

5 MR. BOIES: Not on this record and not - - - not
6 that you'll find anywhere in the stuff in front of you.

7 JUDGE SMITH: So - - - so we're wasting our time
8 with all this stuff about their knowledge. You can get
9 summary judgment on - - - on the fact this was - - - that
10 there's no evidence of - - - of illegality?

11 MR. BOIES: I think it's a lot easier to get
12 summary judgment on the - - - on the grounds that there's
13 absolutely no evidence that my client had any involvement
14 in it, and - - - and - - -

15 JUDGE RIVERA: Yeah, but that's because your
16 client says I didn't do it.

17 MR. BOIES: Well, not only - - -

18 JUDGE RIVERA: You can't - - - you can't survive
19 - - - you cannot succeed on summary judgment by simply
20 saying I didn't do it.

21 MR. BOIES: But you can, Your Honor, if there's
22 no evidence that you did do it, and then that's - - -

23 JUDGE RIVERA: Well, but that's what I asked you
24 before is can you - - - are you saying that the only way
25 they can survive - - - or they could succeed in objecting

1 is if there's an actual smoking gun.

2 MR. BOIES: No, not a smoking gun but for - - -
3 for example, Your Honor, suppose that after Mr.
4 Greenberg's conversation with Mr. Ferguson on October
5 31st, they had gone out to do an illegitimate transaction.
6 Mr. Greenberg talks to Mr. Ferguson, they immediately go
7 out to do an illegitimate transaction.

8 JUDGE RIVERA: Um-hum.

9 MR. BOIES: Maybe you have an inference from
10 that.

11 JUDGE RIVERA: Um-hum.

12 MR. BOIES: But that's not what happened. What
13 happened was Mr. Greenberg had a conversation with Mr.
14 Ferguson; they then go out to do a legitimate transaction.
15 As we've pointed out in our brief, we cite to the record
16 all of the evidence is of what they tried to do for the
17 two weeks after that conversation is a legitimate
18 transaction.

19 JUDGE PIGOTT: Your - - - your point was that
20 you did establish your entitlement to judgment and - - -
21 and when I was asking about - - -

22 MR. BOIES: Yes.

23 JUDGE PIGOTT: - - - the other evidence that
24 only can come in to - - - to establish a - - - a question
25 of fact on their side.

1 MR. BOIES: Right. And now - - - now they have
2 to come forward and - - -

3 JUDGE RIVERA: But the fact that it devolves,
4 you're saying, then they cannot rest on his shoulders;
5 they have to do something more?

6 MR. BOIES: Well, they - - - they have to do
7 something more than to say, this is the boss, he must have
8 known that something had turned out to be fraudulent. He
9 asked for a legitimate transaction. That's absolutely
10 clear in the record. There's no evidence - - -

11 JUDGE SMITH: Could - - - could that - - - could
12 that evidence ever be possible if you have a very hands-on
13 boss whose subordinates have done something that works
14 greatly to the country - - - company's advantage? Can a
15 fact finder in a civil case not infer that - - - that that
16 was done with the boss's approval?

17 MR. BOIES: I - - - I don't think that you could
18 have a civil case that says - - - and I don't think
19 there's any case that's ever been decided - - - maybe this
20 court will do it, but I don't think there's ever been a
21 case that said, just because you're the boss, you - - -
22 you are charged with the illegal conduct of all your
23 subordinates.

24 JUDGE SMITH: No, but I'm - - - I'm - - -

25 JUDGE RIVERA: Well, that's not the question.

1 JUDGE SMITH: Yeah. The question is, is it ever
2 rational as a matter of fact to infer - - -

3 MR. BOIES: But - - -

4 JUDGE SMITH: - - - that says something is
5 highly unlikely this would have gone on without the boss's
6 knowledge.

7 MR. BOIES: But, Your Honor, there is - - - you
8 could have had evidence of that. You could have had
9 evidence in the record - - -

10 JUDGE GRAFFEO: But what if they're able - - -

11 MR. BOIES: - - - if that's the way it operated.

12 JUDGE GRAFFEO: What if they're able to bring -
13 - -

14 MR. BOIES: But there isn't.

15 JUDGE GRAFFEO: - - - in the other two
16 individuals - - -

17 MR. BOIES: I'm sorry?

18 JUDGE GRAFFEO: - - - Milton and Ferguson? If
19 the self-incrimination impediment is gone for Milton and
20 Ferguson at - - - by the time this case is tried, would
21 that change the situation?

22 MR. BOIES: It - - - it wouldn't, Your Honor,
23 because there isn't any evidence in the record right now
24 that those people would say anything that would
25 incriminate Mr. Greenberg. In other words, what you have

1 now is you simply have a hope, a speculation - - -

2 JUDGE SMITH: Well, they both - - - they've both
3 - - - they've both been convicted of - - - although the
4 conviction was overturned. The jury found them guilty
5 beyond a reasonable doubt of conspiring with Greenberg.
6 It's not ridiculous to think they might have something to
7 say about it.

8 MR. BOIES: But, Your Honor, if 4517(a) meaning
9 anything, it means that you've got a right, before
10 something is used against you, to participate in that
11 trial and cross-examine. I mean, this is a situation in
12 which there simply isn't any conventional evidence. This
13 is a situation in which - - - I mean, the - - - the
14 injunctive relief that we've been talking about - - -
15 ordinarily - - - and I've been sitting here listening to
16 these other cases. Ordinarily, you require people to
17 preserve arguments. You don't allow them to come into
18 this court and - - - and raise arguments that they didn't
19 raise in the trial court, didn't raise in the Appellate
20 Division. They never raised these arguments in the
21 Appellate Division. They never tried to preserve their -
22 - - their claims in the trial court or in the Appellate
23 Division based on injunctive relief.

24 JUDGE ABDUS-SALAAM: Mr. Boies, what about Ms.
25 Underwood's statement that you first have to establish

1 liability before you can talk about relief, and the
2 injunctive relief is just that, belief?

3 MR. BOIES: But - - - but we moved for summary
4 judgment on their entire claim. And one of the reasons -
5 - - one of the bases - - - and - - - and we - - - we cited
6 this in our - - - in our briefs, and I referred to the
7 pages of the record before. We said, you're not entitled
8 to this claim because you have no basis for injunctive
9 relief and no basis for damages. They never disputed that
10 first one. They disputed the second one until they
11 withdrew it a few weeks ago.

12 JUDGE MASTRO: They never - - - they never
13 conceded anything, though.

14 MR. BOIES: Well - - -

15 JUDGE MASTRO: They never conceded your point.

16 MR. BOIES: They - - - they never - - - they
17 never came out and say, we concede it, but they didn't
18 ever come forward and say, no, you're wrong, we do have
19 evidence that would justify injunctive relief. You will
20 look throughout their briefs, and you will not be able to
21 find any - - -

22 JUDGE MASTRO: Maybe a footnote?

23 MR. BOIES: What? The footnote - - - footnote
24 16 or whatever it is - - - the footnote - - -

25 JUDGE MASTRO: No.

1 MR. BOIES: - - - in there, first of all, that's
2 here; that's not in their briefs to the Appellate
3 Division. They didn't preserve it in the Appellate
4 Division. The footnote here simply says they're not
5 precluded. They have made - - - they've pled it. They
6 don't, in that footnote, give you any evidence. Remember,
7 they've got to come forth with evidence to respond to our
8 summary judgment argument. They don't have any evidence
9 that supports that pleading. We're not saying they didn't
10 plead it, but we're saying that they - - -

11 JUDGE SMITH: You're - - - you're saying, I
12 guess, if they were serious about injunctive relief and
13 you were arguing all this time about whether the - - -
14 whether the damages claims were pre-empted, you would have
15 expected them to say, well, even if we are pre-empted, we
16 still got an injunctive claim?

17 MR. BOIES: We would, and we - - - and we would
18 have expected them in response to your motion for summary
19 judgment to say, you've said we - - - you don't need
20 injunctive relief for these reasons, here is our contrary
21 evidence, here is the evidence as to why we - - -

22 JUDGE GRAFFEO: Disgorgement was not a topic
23 during the discovery period?

24 MR. BOIES: Your Honor, they have never - - -
25 she says, even today, I don't know how much the

1 disgorgement is. There isn't any disgorgement. He never
2 sold a share of stock. He never profited from this.
3 That's what we said in our - - - said to the trial court.
4 We said it to the Appellate Division.

5 JUDGE GRAFFEO: But I they they're claiming - -
6 -

7 MR. BOIES: They never came back.

8 JUDGE GRAFFEO: - - - there may have been
9 additional compensation.

10 MR. BOIES: But they never came forward and ever
11 said - - - said that. I mean, this has gone on for eight
12 years. We have tried, in our summary judgment motion, to
13 put forward our evidence as to why we were entitled to
14 summary judgment. They were then required to come forward
15 with evidence of their own as to why we were not. They
16 never did that with respect to injunctive relief. They
17 never came forward and said, this is the basis, this is
18 why we're entitled to injunctive relief.

19 JUDGE RIVERA: Apart from disgorgement, why
20 can't they get the other injunctive relief?

21 MR. BOIES: I'm sorry?

22 JUDGE RIVERA: Apart from the disgorgement
23 question, why can't they pursue the other injunctive
24 relief that they've already discussed?

25 MR. BOIES: Well, with respect to the breadth of

1 the SEC injunction?

2 JUDGE RIVERA: Yes, yes.

3 MR. BOIES: I just asked the court to look at
4 record 13987 to 13988, and you will see how broad the SEC
5 injunction is. Second, as we've - - - as we've pointed
6 out - - -

7 JUDGE MASTRO: Yeah, but as - - - let me just
8 interrupt you right there. That doesn't give the Attorney
9 General any ability to enforce anything.

10 MR. BOIES: No, Your Honor, it - - - that does
11 not give the Attorney General any authority to do it. But
12 the question is whether, in the scope of the powers of the
13 equity court, it's a useful and desirable exercise of that
14 power to give another injunction where you already have
15 one and to pursue it. If - - -

16 JUDGE MASTRO: It was - - -

17 JUDGE RIVERA: Well, they can ask?

18 MR. BOIES: You - - - you could ask for it.
19 That's exactly my point. You could make an argument that
20 says the SEC injunction isn't going to be enforced or
21 there's a danger it won't be enforced, therefore we want
22 to have it. You could make that argument. My point is
23 that they didn't. My point is that when we said the SEC
24 injunction is enough, you have enough, you don't need this
25 one. Mr. Greenberg's eighty-eight years old; he hasn't

1 worked in this - - - in this - - - for a public company
2 for eight years. There's no indication he's going to in
3 the future. There's no basis for injunctive relief. They
4 could have come forward, like they're supposed to, like
5 conventionally they have to, in a summary judgment
6 situation and said, no, these are the reasons, this is the
7 evidence that indicates we need injunctive relief. They
8 didn't do it, and the reason they didn't to it is nobody
9 thinks this is an injunctive relief case. Nobody's ever
10 thought it was.

11 JUDGE GRAFFEO: Thank you.

12 MR. SAMA: Thank you. Your Honor, I'd like to
13 make a few brief points about the standing injunction.
14 We, I think, point out in argument to this case, two cases
15 that the Attorney General didn't respond to, that's the
16 New York v. Holiday Inns and Hawaii v. Standard Oil, where
17 courts have clearly held if you have one injunction,
18 there's no basis to get another injunction. And the
19 Holiday Inn's case was a case where private litigants - -
20 -

21 JUDGE GRAFFEO: Mr. Sama, what is - - - what is
22 your client specifically barred from doing in the
23 securities industry under the federal - - -

24 MR. SAMA: It's not addressed as securities
25 industry because he's not in the securities industry.

1 Typically, the SEC will go after an injunction
2 against someone who's an officer of a company, does not
3 address securities industry injunction, what they're
4 telling me; it's apples and oranges. What they address is
5 future fraud, not just federal securities laws, contrary
6 to what the Attorney General said, but any action that
7 would have the scheme or artifice; it's a very long - - -
8 and Mr. Boies gave you the reference. I can give you the
9 other reference. It's R-13999 to 14013 in this record.
10 It's very broad. And in the Holiday Inns case, the
11 Attorney General tried to get injunction as well, but the
12 court in that case said, prior litigants have the
13 injunction; one injunction is sufficient to stop that
14 conduct. And that - - - that's that one point.

15 On disgorgement, the one point I would make that
16 Mr. Boies alluded to is that, to the extent to which there
17 was any disgorgement, that would have been a claim by AIG.
18 And it's a matter of record here that these defendants - -
19 - these appellants settled with AIG in which they get an
20 express release, that's in the -- it's 8K that was filed
21 on November 25th, 2009; they released these defendants
22 from all claims that AIG may have had in the past or in
23 the future relating to their service of the company.

24 The final point I wanted to - - - on hearsay is
25 that, one thing that was avoided that Justice Ramos

1 clearly held in this case that there was insufficient
2 evidence for the co-conspirator exception to the hearsay
3 rule to apply to Mr. Smith. And if you look at the
4 Attorney General's brief, really, when they - - - the
5 reason why they - - - they try to argue that, and
6 notwithstanding that, even though there's Hecht - - - the
7 Hecht case and this court clearly makes it clear that you
8 cannot argue something that you didn't appeal - - -
9 they're arguing, I respectfully submit, because if you
10 look at the evidence, there is insufficient evidence to -
11 - - given the Lynn G./Hugo cases and Alvarez, they really
12 just have unsuspect - - - unsustained assertions and
13 arguments eight years later rather than admissible
14 evidence. Thank you.

15 JUDGE GRAFFEO: Thank you.

16 (Court is adjourned)

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

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I, David Rutt, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Greenberg, No. 63 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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