SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS J.S.C. PART 46
Justice

Index Number : 450460/2016
THE STATE OF NEW YORK
vs.
NORTHERN LEASING SYSTEMS, INC.
SEQUENCE NUMBER : 008
OTHER RELIEFS (LIMITED DISCOVERY)

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 514 to 540, were read on this motion to/for disclosure

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 514-18
Answering Affidavits — Exhibits _____ No(s). 532
Replying Affidavits _____ No(s). 540

Upon the foregoing papers, it is ordered that ~~this motion is~~ :

The court denies the motion by respondents Northern Leasing Systems, Inc., Lease Finance Group LLC, MBF Leasing LLC, Lease Source-LSI LLC, Golden Eagle Leasing LLC, Pushpin Holdings LLC, Cohen, and Hertzman for disclosure pursuant to the accompanying decision. C.P.L.R. § 408.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 5/29/20

Lucy Billings, J.S.C.
LUCY BILLINGS J.S.C.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES, Attorney General of the State of New York, and GEORGE J. SILVER, Deputy Chief Administrative Judge for New York City Courts,

Petitioners

- against -

Index No. 450460/2016

DECISION AND ORDER

NORTHERN LEASING SYSTEMS, INC., LEASE FINANCE GROUP LLC, MBF LEASING LLC, LEASE SOURCE-LSI, LLC a/k/a LEASE SOURCE, INC., GOLDEN EAGLE LEASING LLC, PUSHPIN HOLDINGS LLC, JAY COHEN a/k/a ARI JAY COHEN, individually, as a principal of NORTHERN LEASING SYSTEMS, INC., as a member of LEASE FINANCE GROUP LLC, and as an officer of PUSHPIN HOLDINGS LLC, NEIL HERTZMAN, individually and as an officer of NORTHERN LEASING SYSTEMS, INC., JOSEPH I. SUSSMAN, P.C., JOSEPH I. SUSSMAN, individually and as a principal of JOSEPH I. SUSSMAN, P.C., and ELIYAHU R. BABAD, individually and as a principal or associate of JOSEPH I. SUSSMAN, P.C.,

Respondents

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APPEARANCES:

For Petitioners
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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Petitioner James, New York Attorney General, sues pursuant to New York Executive Law § 63(12) for respondents' fraud and other illegal conduct in leasing equipment. The lessors are respondents Northern Leasing Systems, Inc., Lease Finance Group LLC, MBF Leasing LLC, Lease Source-LSI, LLC, Golden Eagle Leasing LLC, and Pushpin Holdings (Northern Leasing respondents). Respondents Cohen and Hertzman are officers of the Northern

Leasing respondents. Respondents Joseph I. Sussman, P.C., Sussman, and Babad (attorney respondents) enforced the leases through litigation. Petitioner James also seeks dissolution of Northern Leasing, Inc., based on its fraud and illegal conduct. N.Y. Bus. Corp. Law (BCL) § 1101(a)(2). Petitioner Judge Silver seeks to vacate the default judgments respondents have obtained in actions to enforce the equipment leases. C.P.L.R. § 5015(c).

Petitioners move for a judgment for the relief sought in their petition based on the supporting evidence presented. C.P.L.R. § 409(b). Respondents move for a judgment dismissing the claims against them, id., or, to the extent that petitioners' claims are not dismissed, for a trial on the surviving claims, C.P.L.R. § 410, and for pre-trial disclosure. C.P.L.R. § 408.

II. THE PARTIES' POSITIONS

A. LESSEES' AND THEIR GUARANTORS' COMPLAINTS

Petitioners present 873 affidavits by equipment lessees or their guarantors complaining about the Northern Leasing respondents and the salespersons through whom the Northern Leasing respondents' leases were entered. The disputes arose from equipment finance leases (EFLs) of point of sale credit card processing equipment, of check reading machines, and of signs. While the affidavits recount the salepersons' misrepresentations

to the lessees and guarantors, since those statements are not offered for their truth, they are not hearsay. People v. Patterson, 28 N.Y.3d 544, 549 (2016); People v. Becoats, 17 N.Y.3d 643, 655 (2011); People v. Bautista, 132 A.D.3d 523, 525 (1st Dep't 2015), aff'd, 30 N.Y.3d 935 (2017); Bruckmann, Rosser, Sherrill & Co., L.P. v. March USA, Inc., 87 A.D.3d 65, 68 n.* (1st Dep't 2011).

Lessees attest that they signed an EFL on a single page and later received additional pages with their signatures on them or an EFL with terms different than the salespersons described. Salespersons failed to leave a copy of the signed EFL with lessees and informed them that they were signing credit applications or price quotation documents. Lessees reported not receiving a copy of the EFL even after requesting one or receiving copies (1) that were illegible due to poor facsimile quality or small print, (2) only after requesting a copy from the Northern Leasing respondents, or (3) after the renegotiation or cancellation period expired.

Most lessees believed they were purchasing credit card processing services, renewing those services at a better rate, or upgrading or replacing current equipment and were completely unaware of entering any agreement with the Northern Leasing

respondents. Salespersons represented to lessees that the EFL was required for lower rates on credit card processing services.

Lessees complained of not receiving equipment or receiving equipment that was not the type they had agreed to, did not function, or ceased functioning, which the salespersons failed to remedy. Many lessees further complained of paying thousands of dollars for equipment that costs only hundreds of dollars and of the Northern Leasing respondents charging for equipment that was inoperative or obsolete or that the lessees never received, never used, or returned, charges that continued years after the EFL expired or the lessee's business was sold or closed.

Lessees reported forgery, fraud, or misrepresentation to the Northern Leasing respondents without a response, even though the lessees completed the affidavits that the Northern Leasing respondents required, and complained that they ignored inquiries into the debts owed. The Northern Leasing respondents attempted to collect the claimed debts from guarantors who were not owners of the business for which the equipment was leased, but were employees, volunteer workers, visitors, or identity theft victims with no connection to the business.

Regarding the collection actions commenced to enforce the EFLs and the resulting default judgments, many lessees and

guarantors attest that they never received notice of the action or that it was commenced many years after the EFL expired. Most of the lessees and guarantors, most of whom did not reside in New York, attest that defending the action in New York was cost prohibitive. Lessees and guarantors further complained that the Northern Leasing respondents made excessive demands for payment via written correspondence and via telephone, threatened to collect from family members or report the lessees and guarantors to credit reporting agencies, and actually made such reports.

B. THE NORTHERN LEASING RESPONDENTS' LEASE PROCEDURES

According to Cohen, Northern Leasing Systems' founder and chief executive officer, the Northern Leasing respondents' business is to finance leases of equipment. Four parties are involved in the EFLs that the Northern Leasing respondents finance: the merchant-lessees, the personal guarantors, independent sales organizations (ISOs), and the lessors, the Northern Leasing respondents. The Northern Leasing respondents, which employ no salespersons, rely on the ISOs to secure EFL applications from lessees. Typically, the ISOs sell credit card processing services on a bank's behalf. The ISOs acquire, deliver, and install the equipment for the lessees. After the lessee and guarantor sign the EFL application, the ISOs present

it to the Northern Leasing respondents with a voided check to allow for automatic debits of the monthly EFL payments. The Northern Leasing respondents verify the EFL application through a credit report. The signed EFL applications become EFLs only when the Northern Leasing respondents sign them. After the Northern Leasing respondents approve an EFL, they pay the ISO the full amount of the EFL, and the ISO transfers title of the equipment to the Northern Leasing respondents, which then sign the EFL.

C. WHETHER A TRIAL IS REQUIRED

In a special proceeding such as this one: "If triable issues of fact are raised they shall be tried forthwith and the court shall make a final determination thereon." C.P.L.R. § 410; Matter of Pharmacia & Upjohn Co. (Elan Pharms., Inc.), 10 A.D.3d 331, 334 (1st Dep't 2004). See People ex rel. Robertson v. New York State Div. of Parole, 67 N.Y.2d 197, 202 (1986). The Northern Leasing respondents' first line of defense is to deny liability for any ISO's misconduct, claiming that the factual record establishes the absence of an agency relationship between them and any ISO. For all their defenses, the Northern Leasing respondents rely on their business records. Oksana Arkhipova, Northern Leasing Systems' director of information technology, lays a business record foundation for the admissibility of their

records regarding 136 merchants, including transcripts of the Northern Leasing respondents' verification telephone calls to lessees, their "welcome letters" to lessees, equipment delivery and acceptance receipts, and logs confirming lessees' payments. Aff. of Oksana Arkhipova ¶¶ 12-146 (Apr. 5, 2019). See C.P.L.R. § 4518(a). The Northern Leasing respondents maintain that their verification telephone calls and welcome letters and the equipment delivery and acceptance receipts confirm execution and receipt of the EFL, its terms, and receipt of functioning equipment and, together with their logs confirming lessees' payments, belie the lessees' complaints.

The transcripts of recorded verification telephone conversations with lessees on which the Northern Leasing respondents rely to refute the lessees' complaints, however, are certified by the transcriber as an accurate transcription of the recording, but lack any foundation for the authenticity of the recording transcribed. Neither participant in the recorded conversation attests that the recording is a fair and accurate reproduction of the conversation. Grucci v. Grucci, 20 N.Y.3d 893, 897 (2012); People v. Ely, 68 N.Y.2d 520, 527 (1986). See People v. Dicks, 100 A.D.3d 528, 528 (1st Dep't 2012). The transcript does not even identify the Northern Leasing

respondents' participant.

Even if the court considers the recorded conversations, the Northern Leasing respondents do not show that these conversations occur with any regularity. Arkhipova admits that the Northern Leasing respondents telephoned only about 15% of lessees since 2010. Aff. of Oksana Arkhipova ¶ 19 (June 14, 2018).

The Northern Leasing respondents' attempt to refute lessees' complaints by presenting delivery and acceptance receipts executed by the lessees also fails. The receipts acknowledge execution and receipt of the EFL, its terms, and receipt of functioning equipment, but are not notarized or otherwise authenticated on personal knowledge. Clarke v. American Truck & Trailer, Inc., 171 A.D.3d 405, 406 (1st Dep't 2019); B & H Florida Notes LLC v. Ashkenazi, 149 A.D.3d 401, 403 n.2 (1st Dep't 2017); AQ Asset Mgt. LLC v. Levine, 128 A.D.3d 620, 621 (1st Dep't 2015); IRB-Brasil Resseguros S.A. v. Portobello Intl. Ltd., 84 A.D.3d 637, 637-38 (1st Dep't 2011). See Grand Manor Health Related Facility, Inc. v. Hamilton Equities, Inc., 122 A.D.3d 481, 482 (1st Dep't 2014); Batista v. City of New York, 108 A.D.3d 484, 485 (1st Dep't 2013); Singer Asset Fin. Co., LLC v. Melvin, 33 A.D.3d 355, 357-58 (1st Dep't 2006); Acevedo v. Audubon Mgt., 280 A.D.2d 91, 95 (1st Dep't 2001). The EFLs in

the Northern Leasing respondents' files are similarly unauthenticated. The delivery and acceptance receipts and the EFLs are probative based on the lessees' signatures. The Northern Leasing respondents' mere retention of the delivery and acceptance receipts and the EFLs in their files does not authenticate the signatures on those documents any more than it would qualify them as business records. See People v. Cratsley, 86 N.Y.2d 81, 90 (1995); Tri-State Loan Acquisitions III, LLC v. Litkowski, 172 A.D.3d 780, 782 (2d Dep't 2019); Bank of N.Y. Mellon v. Gordon, 171 A.D.3d 197, 209 (2d Dep't 2019).

Even if the court considers both the recorded conversations and the receipts, the Northern Leasing respondents do not point to a single instance when the lessee denied execution or receipt of an EFL, or demonstrated no understanding of the EFL's terms, or denied receipt of functioning equipment, and the Northern Leasing respondents responded other than by insisting that the EFL was non-cancelable. Nor do they point to a single instance when a lessee complained that the leased equipment no longer functioned and that the ISO that sold the equipment had disappeared or had disclaimed any warranty or responsibility, and the Northern Leasing respondents responded other than by disclaiming responsibility themselves and, again, insisting that

the EFL was non-cancelable.

The Northern Leasing respondents further contend that, within 10 days after they sign an EFL, they send their welcome letter confirming the EFL's terms, accompanied by a signed copy of the EFL. No witness attests to the Northern Leasing respondents' regular mailing procedures, however, to establish the welcome letters' transmission. Hermitage Ins. Co. v. Zaidman, 107 A.D.3d 579, 580 (1st Dep't 2013); Tower Ins. Co. of N.Y. v. Ray & Frank Liq. Store, Inc., 104 A.D.3d 482, 483 (1st Dep't 2013); People v. Torres, 99 A.D.3d 429, 430 (1st Dep't 2012).

The Northern Leasing respondents' "comment logs" include "contemporaneous notes of each event involving the EFL, such as telephone calls made and received, letters sent and received, credit inquiries, payments made and payments that were rejected by a bank." Arkhipova Aff. ¶ 10 (Apr. 5, 2019). Since no witness explains the meaning of the entries in the comment logs, which are not self-explanatory, the comment logs lack the probative value necessary for their admissibility. People v. Mingo, 12 N.Y.3d 563, 575-76 (2009). Even if the comment logs established lessees' regular payments under the EFLs without objection, the payments do not amount to admissions that no

forgery, fraud, misrepresentation, or deficient equipment was involved in the transaction as the Northern Leasing respondents' contend, because the monthly payments are automatically debited from the lessees' accounts.

Finally, the affidavits by Cohen and Ron Kinchloe, Northern Leasing Systems' president, regarding the Northern Leasing respondents' procedures for customer service and investigation of forgery, fraud, and misrepresentation claims, without more, do not establish that the Northern Leasing respondents' employees followed those procedures. Singh v. Citibank, N.A., 136 A.D.3d 521, 521 (1st Dep't 2016); Masillo v. On Stage, Ltd., 83 A.D.3d 74, 80 (1st Dep't 2011); Dones v. New York City Hous. Auth., 81 A.D.3d 554, 554 (1st Dep't 2011); Dorsey v. Les Sans Culottes, 43 A.D.3d 261, 261 (1st Dep't 2007). Most significantly, the Northern Leasing respondents present no affidavit or deposition testimony by any ISOs' employees to rebut the lessees' consistent accounts. Nor does Cohen, while attesting to procedures for screening applicants to become ISOs, attest to any procedure for verifying through the ISOs that they present validly executed EFL applications.

Since the Northern Leasing respondents' evidence fails to raise factual issues, no trial is required. C.P.L.R. § 409(b);

People ex rel. Robertson v. New York State Div. of Parole, 67 N.Y.2d at 203; Hotel 71 Mezz Lender, LLC v. Rosenblat, 64 A.D.3d 431, 432 (1st Dep't 2009); People v. Park Ave. Plastic Surgery, P.C., 48 A.D.3d 376, 367 (1st Dep't 2008). See Schreiber v. K-Sea Transp. Corp., 9 N.Y.3d 331, 340 (2007). Nevertheless, the court still must determine whether petitioners' evidence supports their claims. See Gonzalez v. City of New York, 127 A.D.3d 632, 633 (1st Dep't 2015); Thompson v. Cooper, 91 A.D.3d 461, 462 (1st Dep't 2012); 1091 Riv. Ave. LLC v. Platinum Capital Partners, Inc., 82 A.D.3d 404, 404 (1st Dep't 2011); Karr v. Black, 55 A.D.3d 82, 86 (1st Dep't 2008).

III. CLAIMS UNDER EXECUTIVE LAW § 63(12)

> Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, 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 notice of five days, for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and damages . . . .

N.Y. Exec. Law § 63(12). This provision authorizes petitioner Attorney General to commence an action to enjoin and seek restitution for fraudulent or illegal business activity. People v. Greenberg, 27 N.Y.3d 490, 497 (2016); People v. Sprint Nextel Corp., 26 N.Y.3d 98, 108 (2015); People v. Coventry First LLC, 13

N.Y.3d 108, 114 (2009). Fraud under this provision is "any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions." N.Y. Exec. Law § 63(12); State of New York v. Cortelle Corp., 38 N.Y.2d 83, 86 (1975). See Schneiderman v. Credit Suisse Sec. (USA) LLC, 31 N.Y.3d 622, 633-34 (2018). This provision also defines "repeated" conduct as conduct affecting more than one person and "persistent" conduct as continuing conduct. N.Y. Exec. Law § 63(12).

A. THE INDEPENDENT SALES ORGANIZATIONS' CONDUCT

Petitioners' claims against the Northern Leasing respondents depend to an extent on the ISOs' authority to act for them. The parties dispute whether the ISOs had actual or apparent authority and whether the Northern Leasing respondents ratified the ISOs' unauthorized conduct.

1. The Absence of an Agency Relationship

Evidence of a principal's consent that the agent act on the principal's behalf and under the principal's control demonstrates a principal-agent relationship. Quik Park W. 57 LLC v. Bridgewater Operating Corp., 148 A.D.3d 444, 445 (1st Dep't 2017); Gulf Ins. Co. v. Transatlantic Reins. Co., 69 A.D.3d 71,

96-97 (1st Dep't 2009); Art Fin. Partners, LLC v. Christie's Inc., 58 A.D.3d 469, 471 (1st Dep't 2009). An agent's actual authority derives from the principal's direct manifestation of consent to the agency, such as a formal agreement between the principal and agent, Ojeni v. Lieber, 304 A.D.2d 484, 484 (1st Dep't 2003); Just In-Materials Designs v. I.T.A.D. Assoc., 94 A.D.2d 103, 109 (1st Dep't 1983), aff'd, 61 N.Y.2d 882, 883 (1984); New York Community Bank v. Woodhaven Assoc., LLC, 137 A.D.3d 1231, 1233 (2d Dep't 2016), or an employment or affiliation between them. Dark Bay Intl., Ltd. v. Acquavella Galleries, Inc., 12 A.D.3d 211, 211 (1st Dep't 2004). The exercise of control over the means of work and their results is a critical factor in establishing an agency relationship. Matter of Yoga Vida NYC, Inc. (Commissioner of Labor), 28 N.Y.3d 1013, 1015 (2016); Bynog v. Cipriani Group, 1 N.Y.3d 193, 198 (2003); Rodriguez v. Metropolitan Transp. Auth., 155 A.D.3d 520, 521 (1st Dep't 2017); Quik Park W. 57 LLC v. Bridgewater Operating Corp., 148 A.D.3d at 445. Retention of overall supervisory control, however, does not establish an agency relationship. Zeng Ji Liu v. Bathily, 145 A.D.3d 558, 559 (1st Dep't 2016); Alves v. Petik, 136 A.D.3d 426, 426 (1st Dep't 2016); Chaouni v. Ali, 105 A.D.3d 424, 425 (1st Dep't 2013); Bizjak v. Gramercy Capital Corp., 95

A.D.3d 469, 470 (1st Dep't 2012).

Petitioners contend that the Northern Leasing respondents control the ISOs by requiring them to apply to sell EFLs, providing the EFL forms, training the ISOs how to fill out the forms, assisting the ISOs with marketing, and paying them commissions for completed EFLs. When ISOs engage in forgery, fraud, or deceptive conduct, the Northern Leasing respondents refuse to purchase EFLs and charge rejected EFLs back to the ISOs. The Northern Leasing respondents maintain that the documentary evidence demonstrates the absence of ISOs' authority to make representations or to sign documents on the Northern Leasing respondents' behalf. The Northern Leasing respondents further maintain that, even if they exercised control as petitioners contend, petitioners fail to demonstrate that the Northern Leasing respondents trained the ISOs to make misrepresentations, alter EFLs after they are signed, or forge signatures.

The Northern Leasing respondents' application process for ISOs is nothing more than overall management or supervisory control. Zeng Ji Liu v. Bathily, 145 A.D.3d at 559. The Northern Leasing respondents' instructions to ISOs regarding how to fill out forms do not demonstrate control over the ISOs'

methods in procuring EFL applications. Chainani v. Board of Educ. of City of N.Y., 87 N.Y.2d 370, 380 (1995); DeFeo v. Frank Lambie, Inc., 146 A.D.2d 521, 522 (1st Dep't 1989). The Northern Leasing respondents seek ISOs' assistance in procuring EFL applications, but do not direct the ISOs how to procure EFL applications, from whom, for what equipment, or for what price. Marzec v. City of New York, 136 A.D.3d 410, 410 (1st Dep't 2016); Vargas v. Beer Garden, Inc., 15 A.D.3d 277, 278 (1st Dep't 2005); Gruenberg v. Mann, 297 A.D.2d 552, 553 (1st Dep't 2002). See Constantiner v. Soverign Apts., Inc., 165 A.D.3d 539, 540 (1st Dep't 2018). Nor does allowing ISOs to use EFLs bearing a Northern Leasing respondent's name establish an agency. Bizjak v. Gramercy Capital Corp., 95 A.D.3d at 470.

In fact, the Northern Leasing respondents' total absence from the execution of EFL applications by ISOs and merchants indicates the lack of any close supervisory control. Goodwin v. Comcast Corp., 42 A.D.3d 322, 323 (1st Dep't 2007). The express agreement between the Northern Leasing respondents and the ISOs that they are not principals and agents, Quik Park W. 57 LLC v. Bridgewater Operating Corp., 148 A.D.3d at 445; Zeng Ji Liu v. Bathily, 145 A.D.3d at 558-59, as well as the EFLs' provision to the same effect, and the Northern Leasing respondents'

commissions to ISOs for completed EFL applications further evince an independent contractor relationship. Matter of Ted Is Back Corp. (Roberts), 64 N.Y.2d 725, 726 (1984); Bizjak v. Gramercy Capital Corp., 95 A.D.3d at 470.

2. The Absence of Apparent Authority

To establish the ISOs' apparent authority to act for the Northern Leasing respondents, petitioners must demonstrate that the lessees relied on the the ISOs' misrepresentations because of the Northern Leasing respondents' misleading conduct, Indosuez Intl. Fin. v. National Reserve Bank, 98 N.Y.2d 238, 245-46 (2002); N.X. v. Cabrini Med. Ctr., 97 N.Y.2d 247, 252 n.3 (2002); Standard Funding Corp. v. Lewitt, 89 N.Y.2d 546, 551 (1997); Hallock v. State of New York, 64 N.Y.2d 224, 231 (1984), a showing petitioners fail to make. N.X. v. Cabrini Med. Ctr., 97 N.Y.2d at 252 n.3; Standard Funding Corp. v. Lewitt, 89 N.Y.2d at 551; Cotton Field v. Samsung Am., 295 A.D.2d 259, 259 (1st Dep't 2002); McGarry v. Miller, 158 A.D.2d 327, 328 (1st Dep't 1990). Petitioners fail to show that the Northern Leasing respondents interacted in any way with the lessees before the transaction was completed, let alone engaged in conduct that would mislead them to believe the ISOs were the Northern Leasing respondents' agents. Site Five Hous. Dev. Fund Corp. v. Estate of Bullock,

112 A.D.3d 479, 480 (1st Dep't 2013); Dark Bay Intl., Ltd. v. Acquavella Galleries, Inc., 12 A.D.3d at 212; McGarry v. Miller, 158 A.D.2d at 328. Instead, petitioners establish only that lessees relied on misrepresentations by the alleged agents, the ISOs, which does not establish apparent authority. Ford v. Unity Hosp., 32 N.Y.2d 464, 473 (1973). The Northern Leasing respondents' names on the EFLs that the ISOs sold, without more, does not confer apparent authority on the ISOs. Ford v. Unity Hosp., 32 N.Y.2d at 468, 473; Balsam v. Delma Eng'g Corp., 139 A.D.2d 292, 297 (1st Dep't 1988). See Bardach v. Weber, 144 A.D.3d 553, 553 (1st Dep't 2016); Cross v. Supersonic Motor Messenger Courier, Inc., 140 A.D.3d 503, 504 (1st Dep't 2016); Reinoso v. Biordi, 105 A.D.3d 491, 492 (1st Dep't 2013).

3. Ratification Is Inapplicable.

Had petitioners shown that the Northern Leasing respondents exercised control over the ISOs so as to render them agents, but not shown that the Northern Leasing respondents instructed the ISOs to make misrepresentations, alter EFLs after execution, or forge signatures, then petitioners might establish the principals' liability through their ratification of the agents' acts. The principals' knowledge of their agents' fraudulent acts and acceptance the benefits of those acts, even if previously

unauthorized, will establish ratification. Standard Funding Corp. v. Lewitt, 89 N.Y.2d at 552; New York State Med. Transporters Assn. v. Perales, 77 N.Y.2d 126, 131 (1990); La Candelaria v. E. Harlem Community Ctr., Inc. v. First Am. Tit. Ins. Co. of N.Y., 146 A.D.3d 473, 473 (1st Dep't 2017). See Cashel v. Cashel, 15 N.Y.3d 794, 796 (2010). Even though the ISOs' misrepresentation, fraud, or forgery might not be readily apparent simply from the EFLs that the ISOs present to the Northern Leasing respondents, petitioners do show, as set forth below, the Northern Leasing respondents' knowledge of the ISOs' fraudulent or illegal acts necessary to establish ratification of those acts. Nevertheless, petitioners' failure to support the Northern Leasing respondents' control over the ISOs' conduct so as to confer an agency relationship in the first instance precludes petitioners from establishing ratification of the ISOs' misconduct. See Cashel v. Cashel, 15 N.Y.3d at 796; New York State Med. Transporters Assn. v. Perales, 77 N.Y.2d at 131; CIT Tech. Fin. Servs. I LLC v. Bronx Westchester Med. Group, P.C., 117 A.D.3d 567, 567 (1st Dep't 2014).

B. THE NORTHERN LEASING RESPONDENTS' OWN CONDUCT

It is the Northern Leasing respondents' very hands-off attitude toward the ISOs, however, that inculpates the Northern

Leasing respondents and thus is their undoing.

1. The Equipment Finance Leases

The parties do not dispute that the Northern Leasing respondents drafted their EFLs, which petitioners contend are unconscionable. An unconcionable contract requires a showing that when the contract was entered it was both procedurally unconscionable and substantively unconscionable. Lawrence v. Graubard Miller, 11 N.Y.3d 588, 595 (2008); Gillman v. Chase Manhattan Bank, 73 N.Y.2d 1, 11 (1988); Ortegas v. G4S Secure Solutions (USA) Inc., 156 A.D.3d 580, 580 (1st Dep't 2017); Green v. 119 W. 138th St. LLC, 142 A.D.3d 805, 808 (1st Dep't 2016). Procedural unconscionability relates to the circumstances of a contract's formation and encompasses the use of high pressured tactics or deception; the contract's legibility; the education, experience, and language ability of the party claiming unconscionability; and the disparity of bargaining power. Gillman v. Chase Manhattan Bank, 73 N.Y.2d at 11; State v. Avco Fin. Serv. of N.Y., 50 N.Y.2d 383, 390 (1980); Green v. 119 W. 138th St. LLC, 142 A.D.3d at 809; Dabriel, Inc. v. First Paradise Theaters Corp., 99 A.D.3d 517, 520 (1st Dep't 2012). Since petitioners' claims of procedural unconscionability arise from the ISOs' actions, petitioners do not establish the Northern

Leasing respondents' liability for any procedural unconscionability. Thus, even if petitioners establish that the EFLs are substantively unconscionable, without the procedural unconscionability, petitioners will not establish the EFLs' unconscionability.

2. Processing the Lease Applications

The Northern Leasing respondents are liable for their own conduct in accepting and enforcing EFLs. A claim under Executive Law § 63(12) is the exercise of "the State's regulation of businesses within its borders in the interest of securing an honest marketplace." People v. Coventry First LLC, 52 A.D.3d 345, 346 (1st Dep't 2008), aff'd, 13 N.Y.3d 108 (2009). Executive Law § 63(12) expands fraud to encompass new liability, while including non-statutory fraud claims. State of New York v. Cortelle Corp., 38 N.Y.2d at 87. A claim under § 63(12) does not require evidence of bad faith, scienter, People v. General Elec. Co., 302 A.D.2d 314, 315 (1st Dep't 2003); People v. Apple Health & Sports Clubs, 206 A.D.2d 266, 267 (1st Dep't 1994), or the elements of common law fraud such as reliance. People v. Coventry First LLC, 52 A.D.3d at 346, aff'd, 13 N.Y.3d 108. The test for fraud under Executive Law § 63(12) is whether an act tends to deceive or creates an environment conducive to fraud.

People v. General Elec. Co., 302 A.D.2d 314; People v. Applied Card Sys., Inc., 27 A.D.3d 104, 106 (3d Dep't 2005), aff'd, 11 N.Y.3d 105 (2008).

Against this backdrop, the Northern Leasing respondents' enforcement of their EFLs constitutes repeated and persistent fraud under Executive Law § 63(12) because their chosen method of procuring EFLs both is deceptive in itself and has created an enterprise conducive to fraud. All the lessees' affidavits attest to ISOs' misrepresentations of credit card processing rates; that leasing the equipment is necessary to obtain lower processing rates; and promising the ISOs' delivery, installation, or repair of the equipment, a trial period for the equipment, and that the EFL or the service is cancelable. Materially misleading representations violate Executive Law § 63(12). People v. Orbital Publ. Group, Inc., 169 A.D.3d 564, 565 (1st Dep't 2019). Wilful oral misrepresentations in particular constitute fraud under § 63(12). State of New York v. Cortelle Corp., 38 N.Y.2d at 87.

Many lessees also deny signing EFLs and claim that the EFLs bearing their signatures are forgeries. The Northern Leasing respondents capitalize on the ISOs' oral misrepresentations by processing EFL applications without proving the EFLs' valid

execution by admissible, reliable evidence and lock lessees into EFLs that automatically renew in perpetuity and may not be cancelled, for services of extremely questionable value. The lessees receive no warranty from the ISO or the equipment manufacturer to permit the Northern Leasing respondents, as equipment finance lessors, to use their noncancellation provision. N.Y.U.C.C. § 2-A-103(1((g). See Canon Fin. Servs. v. Medico Stationery Serv., 300 A.D.2d 66, 67 (1st Dep't 2002). When lessees attempt to return inoperative equipment, the ISO to which they would return the equipment has disappeared. Even when lessees do return equipment, the Northern Leasing respondents deny that the leased equipment was returned and continue to charge the lessees for it.

Cohen attests that the Northern Leasing respondents will charge back to the ISOs EFLs found to be the product of forgery, fraud, or misrepresentation, cease collecting payments under the EFL, and cancel it. Arkhipova attests, however, that these instances are in less than 0.3% of EFLs. Arkhipova Aff. ¶¶ 15-16 (June 14, 2018). In any event, in none of these instances does Cohen attest that the Northern Leasing respondents refund already collected payments to the lessees or cease conducting business through the offending ISO. The Northern Leasing respondents'

failure to oversee the ISOs and to assess any meaningful penalty against them for presenting a fraudulent EFL has created an enterprise conducive to fraud. The forgeries, material misrepresentations, and non-cancelable EFLs even when the leased equipment is never delivered, does not function, or is returned would never occur but for the Northern Leasing respondents creating their market for the ISOs, through their commissions, and then washing their hands of the ISOs' conduct. Given the number of lessees' complaints about similar ISO misconduct, the Northern Leasing respondents were on notice that securing EFLs through the ISOs was conducive to fraud. See Chapman v. Silber, 97 N.Y.2d 9, 21-22 (2001); Berenger v. 261 West LLC, 93 A.D.3d 175, 182 (1st Dep't 2012). That knowledge sustains petitioners' fraud claim. IKB Intern. S.A. v. Morgan Stanley, 142 A.D.3d 447, 450 (1st Dep't 2016); AIG Fin. Prods. Corp. v. ICP Asset Mgt., LLC, 108 A.D.3d 444, 446 (1st Dep't 2014).

More fundamentally, it is difficult to discern the "service" that the Northern Leasing respondents claim to provide by financing equipment worth a few hundred dollars for thousands of dollars over several years. The Northern Leasing respondents retain title to the equipment, but disclaim any warranty of the equipment, require the lessees to insure it, and leave

responsibility for repairing or replacing defective equipment to the ISOs over which the Northern Leasing respondents retain no control.

To be sure, lessees' admissions to signing contract documents without reading or understanding them or signing blank contract documents do not excuse their obligation to perform under those contracts. Suttongate Holdings Ltd. v. Laconm Mgt. N.V., 173 A.D.3d 618, 620 (1st Dep't 2019); Jin-Rong Yu v. 2030 Embassy LLC, 83 A.D.3d 562, 563 (1st Dep't 2011); Pludeman v. Northern Leasing Sys., Inc., 74 A.D.3d 420, 423 (1st Dep't 2010); Martin v. Citibank, N.A., 64 A.D.3d 477, 477 (1st Dep't 2009). The lessees who admitted to these failures, however, account for only a small number of the lessees who present complaints. Contrary to the Northern Leasing respondents' contention, even a small fraction of the total number of complaints presented would sustain a claim under Executive Law § 63(12). State of New York v. Princess Prestige Co., 42 N.Y.2d 104, 107 (1977). Petitioners need not prove a high percentage of violations among all the lease transactions. Id. (0.44% is enough).

Moreover, lessees' failure to read or understand contract documents or their execution of blank contract documents does not excuse misrepresentations of the documents' contents or meaning

or alterations in the documents after they were signed, even if the oral misrepresentations are not binding and the written contract remains binding. Nor is it binding if it was fraudulently induced by misrepresentations beyond its terms, such as the functionality of the equipment or the costs it saved. DDJ Mgt. LLC v. Rhones Group L.L.C., 15 N.Y.3d 147, 154 (2010); Knox, LLC v. Lakian, 182 A.D.3d 466, 467 (1st Dep't 2020); PF2 Sec. Evaluations v. Fillebeen, 171 A.D.3d 551, 553 (1st Dep't 2019); OHC NYC LLC v. Times Sq. Assoc. LLC, 170 A.D.3d 534, 534 (1st Dep't 2019).

3. Enforcing the Leases

The EFLs' provisions permitting service of legal process through means unlikely to give notice and selecting the New York City Civil Court in New York County (New York County Civil Court) as the forum for disputes, discouraging participation in the litigation, allow the Northern Leasing respondents to secure judgments by the easiest means possible. The sample EFLs that the Northern Leasing respondents present allow service of process on the lessees and guarantors by certified mail to the address listed on the EFL or the "current or last known address at the time of suit." Aff. of Jay Cohen (June 14, 2018) Ex. 1-1 at 2, 5, Ex. 1-2, at 1-2, Ex. 1-3, at 1, 4, Ex. 1-4, at 2, 5, Ex. 1-5,

at 2, 5, Ex. 1-6, at 1, 4, Ex. 1-7, at 1-2, Ex. 1-8, at 1-2, Ex. 1-9, at 2, 4, Ex. 1-10, at 2, 4, Ex. 1-11, at 2, 5, Ex. 1-12, at 2, 4, Ex. 1-13, at 1-2, Ex. 1-14 at 2, 4. Alternate service, even if contractually permitted, still must be reasonably calculated to provide notice. See Mestecky v. City of New York, 30 N.Y.3d 239, 246 (2017); Matter of Orange County Commr. of Fin. (Helseth), 18 N.Y.3d 634, 639 (2012); Ruffin v. Lion Corp., 15 N.Y.3d 578, 582 (2010); Kennedy v. Mossafa, 100 N.Y.2d 1, 9-10 (2003). Service at the address on the EFL, entered many years earlier, or the last known address, which may be equally obsolete, does not ensure service to a valid, current address and thus is not reasonably calculated to provide the required notice. Unsurprisingly, therefore, many lessees and guarantors attest to complete unawareness of a dispute before litigation was commenced, unawareness of the litigation when it was commenced, and unawareness of the litigation until after a default judgment was entered against them.

The EFL and its guaranty do not advise lessees or guarantors to update their addresses on the EFL. Nor would a lessee or guarantor discern any reason to do so after the lease term has expired or the equipment has been returned. Yet respondents typically do not commence litigation until after that point. To

the extent that respondents rely on a last known address, this provision is impossible to enforce, particularly when the litigation is unopposed. The use of these means not reasonably calculated to give notice and impossible to enforce, combined with the fraud in procuring these EFL provisions in the first instance, are all grounds to deny effect to the EFLs' service provisions. See Rubens v. UBS AG, 126 A.D.3d 421, 421 (1st Dep't 2015); Public Adm'r Bronx County v. Montefiore Med. Ctr., 93 A.D.3d 620, 621 (1st Dep't 2012); British W. Indies Guar. Trust Co. v. Banque Internationale A Luxembourg, 172 A.D.2d 234, 234 (1st Dep't 1991).

The Northern Leasing respondents admit that they commence untimely as well as timely actions against defaulting lessees or their guarantors and justify collection of expired debts on the grounds that expiration of the statute of limitations is an affirmative defense that the defendants must raise to bar an action. Given the number of lessees and guarantors who reported not receiving notice of Northern Leasing respondents' collection actions against these defendants until after a judgment was entered against them, an affirmative defense offers no remedy. Even if raised as a basis to vacate a judgment, the defense will be effective only if the lessees and guarantors establish a

reasonable excuse for defaulting by showing the absence of notice. Caesar v. Harlem USA Stores, Inc., 150 A.D.3d 524, 524 (1st Dep't 2017); Melinda M. v. Anthony J.H., 143 A.D.3d 617, 619 (1st Dep't 2016).

The EFLs' provision designating New York County Civil Court as the exclusive forum for litigating disputes further combines with the fraud in procuring the EFLs and the ineffective service provisions to thwart lessees' and guarantors' ability to defend the Northern Leasing respondents' actions. Yoshida v. PC Tech U.S.A. & You-Ri, Inc., 22 A.D.3d 373, 373 (1st Dep't 2005). See GE Oil & Gas, Inc. v. Turbine Generation Servs., L.L.C., 140 A.D.3d 582, 583 (1st Dep't 2016); Camacho v. IO Practiceware, Inc., 136 A.D.3d 415, 416 (1st Dep't 2016); Public Adm'r Bronx County v. Montefiore Med. Ctr., 93 A.D.3d at 621; Sterling Natl. Bank v. Eastern Shipping Worldwide, Inc., 35 A.D.3d 222, 222 (1st Dep't 2006). According to Northern Leasing Systems' Vice President of Sales Richard Hahn, the average total payments due under their EFLs in 2014 was $2,400.00, without interest or fees, but also without deducting any payments made. Even if a lessee or guarantor owes nothing, the cost to defend against such an amount in a faraway forum is more than amount that the Northern Leasing respondents typically are claiming. It is less costly to

allow a default judgment to be entered or to acquiesce to a settlement that is not owed.

Conspicuously, respondents present no evidence to contradict the difficulty and prohibitive cost of litigation in New York for any defendant who does not reside here. Nor do the Northern Leasing respondents present any evidence that it is unduly burdensome for them to prosecute their actions in forums where the defendants reside or conduct business.

4. Liability of Cohen and Hertzman

Cohen and Neil Hertzman, Northern Leasing Systems' Vice President of Customer Service and Collections, as corporate officers, are liable for the Northern Leasing respondents' fraud if they participated in the fraud or received actual notice of the fraud. Polonetsky v. Better Homes Depot, 97 N.Y.2d 46, 55 (2001); People v. Apple Health & Sports Clubs, 80 N.Y.2d 803, 807-808 (1992); People v. Orbital Publ. Group, Inc., 169 A.D.3d at 566; People v. American Motor Club, 179 A.D.2d 277, 283 (1st Dep't 1992). See People v. Northern Leasing Systems, Inc., 169 A.D.3d 527, 530-31 (1st Dep't 2019). The Northern Leasing respondents concede that Cohen, as Northern Leasing Systems' chief executive officer, stands in the same position and is liable to the same extent as Northern Leasing Systems. Since

Hertzman responded to lessees' complaints, he obtained actual knowledge of the likely misleading practices and is liable for participation in that scheme. People v. Greenberg, 21 N.Y.3d 439, 447 (2013); People v. Apple Health & Sports Clubs, 206 A.D.2d at 267. See Polonetsky v. Better Homes Depot, 97 N.Y.2d at 55; People v. Northern Leasing Sys., Inc., 169 A.D.3d at 530-31. The Northern Leasing respondents do not dispute the role that Hertzman has played in their their business. Conspicuously again, Hertzman did not submit any affidavit denying his knowledge of any fraud, which would have raised a factual issue. People v. Greenberg, 21 N.Y.3d at 447.

Cohen, of course, did submit an affidavit laying out the Northern Leasing respondents' procedures for investigating forgery, fraud, and misrepresentation claims, without proving by admissible, reliable evidence any procedure for verifying that ISOs present validly executed EFL applications. Cohen lays out the Northern Leasing respondents' procedure for charging back to the ISOs EFLs found to be the product of forgery, fraud, or misrepresentation, ceasing the collection of payments under the EFL, and cancelling it, without any procedure for refunding already collected payments to the lessees or ceasing business with the offending ISO. Therefore he is unquestionably aware

that the Northern Leasing respondents have failed to oversee the ISOs and assess any meaningful penalty against them for presenting a fraudulent EFL and thus have created an enterprise conducive to fraud. In sum, both corporate officers, Cohen and Hertzman, are liable for the Northern Leasing respondents' fraud.

5. The *Noerr-Pennington* Doctrine

The Noerr-Pennington doctrine, derived from Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and Mine Workers v. Pennington, 381 U.S. 657 (1965), protects the right under the First Amendment to the United States Constitution to petition the government for governmental action, including through litigation, Villanova Estates, Inc. v. Fieldston Prop. Owners Assn., Inc., 23 A.D.3d 160, 161 (1st Dep't 2005); I.G. Second Generation Partners, L.P. v. Duane Reade, 17 A.D.3d 206, 208 (1st Dep't 2005); Singh v. Sukhram, 56 A.D.3d 187, 191 (2d Dep't 2008), and activity incidental to litigation. Nineteen Eighty-Nine, LLC v. Ichan Enters. L.P., 99 A.D.3d 546, 547 (1st Dep't 2012). See Posner v. Lewis, 18 N.Y.3d 566, 572 (2012). The parties seeking the benefit of the doctrine bear the initial burden to demonstrate the doctrine's applicability so as to bar petitioners' claims. See Nineteen Eighty-Nine, LLC v. Ichan Enters. L.P., 99 A.D.3d at 547; Arts4All, Ltd. v. Hancock,

25 A.D.3d 453, 454 (1st Dep't 2006).

The Northern Leasing respondents contend that the Noerr-Pennington doctrine protects their EFL enforcement activities and bar all petitioners' claims. Petitioners counter that the Northern Leasing respondents' conduct falls under the sham exception to the Noerr-Pennington doctrine.

The sham exception to the Noerr-Pennington doctrine encompasses the abuse of a governmental process, rather than its outcome. Singh v. Sukhram, 56 A.D.3d at 192. To establish the sham exception to the doctrine, petitioners must prove that respondents lacked a genuine interest in seeking governmental action, see Shapiro v. Tardalo, 167 A.D.3d 555, 555 (1st Dep't 2018); Villanova Estates, Inc. v. Fieldston Prop. Owners Assn., Inc., 23 A.D.3d at 161; Singh v. Sukhram, 56 A.D.3d at 192; Alfred Weissman Real Estate v. Big V Supermarkets, 268 A.D.2d 101, 109 (2d Dep't 2000), and that their use of the litigation process in that quest was objectively baseless. People v. Northern Leasing Sys., Inc., 169 A.D.3d at 530; I.G. Second Generation Partners, L.P. v. Duane Reade, 17 A.D.3d at 208; Singh v. Sukhram, 56 A.D.3d at 192.

Although in the context of respondents' motion to dismiss the petition, the Appellate Division offers guidance on this

issue. "The allegations that the Northern Respondents created legal obligations through misrepresentations and fraud, and then attempted to enforce those obligations through abusive pre-litigation and litigation practices sufficiently demonstrate that the Northern Respondents' debt-collection activities and procuring of default judgments were 'objectively baseless.'" People v. Northern Leasing Sys., Inc., 169 A.D.3d at 530. This court now has found that the Northern Leasing respondents have chosen methods for procuring EFLs that have created an enterprise conducive to fraud; by the sheer numbers of complaints, are charged with knowledge of the ISOs' persistent misconduct; and have ignored or overlooked such conduct. By the Appellate Division's standard, the Northern Leasing respondents' debt collection activities, through threats to injure credit ratings and to pursue litigation and through actual pursuit of litigation, resulting in a high rate of default judgments, render those activities objectively baseless.

To the extent that the Northern Leasing respondents achieved victory in court due to default judgments, the design and effect of the EFL provisions allowing service by mail to obsolete addresses and designating New York County Civil Court as the forum for litigation are to avoid notice and deprive lessees and

guarantors of their day in court to defend against the EFLs. Yoshida v. PC Tech U.S.A. & You-Ri, Inc., 22 A.D.3d at 373. See GE Oil & Gas, Inc. v. Turbine Generation Servs., L.L.C., 140 A.D.3d at 583; Camacho v. IO Practiceware, Inc., 136 A.D.3d at 416; Public Adm'r Bronx County v. Montefiore Med. Ctr., 93 A.D.3d at 621; Sterling Natl. Bank v. Eastern Shipping Worldwide, Inc., 35 A.D.3d at 222. The service and forum selection provisions and the fraud used to procure the EFLs in the first instance thus demonstrate repeated and persistent fraud, deceit, and deprivation of rights establishing the sham exception. See I.G. Second Generation Partners, L.P. v. Duane Reade, 17 A.D.3d at 208.

In contrast to the high rate of default judgments in the litigation to enforce the EFLs, the Northern Leasing respondents point to the small fraction of lessees' complaints out of the total EFL transactions and maintain that this low rate of complaints demonstrates overwhelming customer satisfaction. This theory assumes that petitioners' 873 complainants are the entire universe of complainants and that every customer who has not presented an affidavit is satisfied. The Northern Leasing respondents themselves admit that over one third of their EFLs are in default, a statistic inconsistent with a high rate of

customer satisfaction. Even those customers who continue to pay under the EFLs may be paying only because the payments are automatically withdrawn from their bank accounts, and the customers cannot stop the withdrawals without closing their account altogether.

The number of satisfied customers, in any event, is irrelevant to the fraud that the Northern Leasing respondents committed, even if in a small fraction of transactions, and the baselessness of any activity to enforce a fraudulent transaction. People v. Codina, 110 A.D.3d 401, 408 (1st Dep't 2013). As set forth above, the number of complaints still amounts to repeated and persistent fraud. State of New York v. Princess Prestige Co., 42 N.Y.2d at 107. By the Appellate Division's standard, the sham exception applies to any of the Northern Leasing respondents' threatening debt collection activities, including litigation, that takes advantage of defendants' lack of notice or inability to travel to New York or hire an attorney in New York, resulting in a high rate of default judgments or pressured settlements. People v. Northern Leasing Sys., Inc., 169 A.D.3d at 530. In this context, the standard does not require any series or pattern of such conduct.

Finally, the Northern Leasing respondents present New York

City Civil Court orders denying lessees' or guarantors' motions to vacate default judgments or to answer late or granting Northern Leasing respondents' motions for summary judgment and thus upholding the EFL terms regarding the guaranty, service of process, and forum selection. These decisions do not bind this court. Moreover, when EFL provisions are upheld in the context of an individual transaction, the decision may be based simply on the recognized principle that the failure to read the EFL does not constitute a defense to the contract. The decision may not consider the combined effect of the fraudulent methods used to procure the EFL, without oversight, and of the onerous EFL provisions that supports the Executive Law § 63(12) claims. Again, lessees' or guarantors' failure to read or understand the EFL or guaranty or their execution of blank documents may not constitute a defense to the documents' terms, but does not excuse misrepresentations of the documents' contents or meaning, alterations in the documents after they were signed, or abusive debt collection and litigation.

IV. THE ATTORNEY RESPONDENTS' CONDUCT

Petitioners claim the attorney respondents are liable under Executive Law § 63(12) due to their long-standing representation of the Northern Leasing respondents in enforcing fraudulently

procured EFLs. Petitioners focus on the attorney respondents' abuse of the litigation process by pressuring lessees and guarantors into settlement, using a means of service not reasonably calculated to provide notice, suing in a forum far from defendants' residence or business, and aggressively using post-judgment collection remedies. Petitioners maintain that the attorney respondents' conduct also falls under the sham exception to the Noerr-Pennington doctrine. The attorney respondents counter that Noerr-Pennington protects their litigation activities, that they are not liable because they are not parties to the EFLs or the judgments obtained, that they have no reason to believe that Northern Leasing respondents engaged in fraud, and that Babad is not liable because he is an employee of Sussman or his firm.

Again, as in analyzing the Northern Leasing respondents' liability under Executive Law § 63(12), albeit in the context of respondents' motion to dismiss the petition, the Appellate Division provides guidance.

> The allegations that the Attorney Respondents continually engaged in a large-scale practice of bringing debt actions against numerous lessees and guarantors across a span of years, despite being aware of the same defenses raised by the lessees against the Northern Respondents, including fraud and misrepresentations, sufficiently allege that the Attorney Respondents knew that their litigation-related

conduct was objectively baseless.

People v. Northern Leasing Sys., Inc., 169 A.D.3d at 531.

Regarding the attorney respondents' pre-litigation conduct, petitioners specifically target the attorney respondents' demand letters that deceptively inflate the demand by including attorneys' fees. Regarding the attorney respondents' litigation, petitioners first present the affidavit of Eddy Valdez, Deputy Chief Clerk of the New York City Civil Court, sworn to March 28, 2016, attesting that from 2010 to 2015, Joseph I. Sussman, P.C., filed 30,768 actions on behalf of the Northern Leasing respondents in New York County Civil Court and entered 19,413 default judgments. Only 778 motions to vacate default judgments were filed from 2010 to 2015. Of the 7,421 Northern Leasing respondents' actions filed in 2015, 7,134 were against defendants residing outside New York State.

In an affidavit sworn to April 3, 2018, Valdez attests that in 2016 and 2017, Joseph I. Sussman, P.C., filed 10,855 actions on the Northern Leasing respondents' behalf in New York County Civil Court, 9,167 of which were filed against defendants residing outside New York State. During that period the actions commenced on the Northern Leasing respondents' behalf constituted 20% of the total actions commenced in New York County Civil

Court. The Northern Leasing respondents obtained 10,204 default judgments in their actions, which constituted over 40% of the total default judgments entered in actions in New York County Civil Court, exclusive of landlord-tenant proceedings. Only 297 motions to vacate default judgments were filed in 2016 and 2017.

The attorney respondents first contend that they did not commit fraud or deception in representing the Northern Leasing respondents because the Northern Leasing respondents did not commit fraud or deception. To support this proposition, the attorney respondents rely on the inadmissible verification call transcripts, Grucci v. Grucci, 20 N.Y.3d at 897; People v. Ely, 68 N.Y.2d at 527, and delivery and acceptance receipts. Clarke v. American Truck & Trailer, Inc., 171 A.D.3d at 406; B & H Florida Notes LLC v. Ashkenazi, 149 A.D.3d at 403 n.2; AQ Asset Mgt. LLC v. Levine, 128 A.D.3d at 621; IRB-Brasil Resseguros S.A. v. Portobello Intl. Ltd., 84 A.D.3d at 637-38, to determine whether to prosecute actions against guarantors. As discussed above, these documents fail to support the absence of fraud or deception by the Northern Leasing respondents.

The evidence instead supports the attorney respondents' notice of the Northern Leasing respondents' fraud and deception under Executive Law § 63(12)'s standard. Sussman's deposition

testimony October 12, 2010, that he participated in drafting versions of the EFLs, plus the sheer number of actions that the attorney respondents commenced on the Northern Leasing respondents' behalf charge them with knowledge of the Northern Leasing respondents' fraudulent practices in procuring the EFLs that the attorney respondents then seek to enforce. They prosecuted more than 71% of the actions that they commenced to default judgments. They also were well aware of the EFLs' mail service and forum selection provisions. From these facts it was obvious to the attorney respondents that lessees and guarantors were not participating in litigation due to the inadequate notice provided by mail service and the logistical difficulties posed by New York City Civil Court forum.

Sussman attests that, despite the EFLs' provision for mail service, the attorney respondents personally served guarantors pursuant to C.P.L.R. § 308 and only began regularly serving process by certified mail as provided in the EFLs in 2013, as if the regular procedure since 2013 were insignificant. Appendix C to Sussman's affirmation also shows that the addresses listed in affidavits of service on 68 of 82 lessees or guarantors matched the address listed on documents that the parties served then filed with the Attorney General or the court. This miniscule

sample does not account for the 14 of 82 addresses that did not match, let alone the tens of thousands of actions commenced by mail service beyond the 82, even if they yielded the same ratio of 14 out of 82 unmatching addresses.

These data demonstrate compliance neither with C.P.L.R. § 308 nor even with the EFLs' requirement that certified mail be sent to the address listed in the EFL or the "current or last known address at the time of suit." Most significantly, these data simply do not demonstrate that, when respondents do comply with the provision for certified mail to the address listed in the EFL or the "current or last known address at the time of suit," that method regularly gives notice to the addressee.

The attorney respondents address the service by mail provision and the forum selection provision separately and urge that the provisions are reasonable when considered separately. In so doing, the attorney respondents ignore these provisions' combined effect, particularly when considered with the fraudulent means by which the EFLs may have been executed, to avoid notice and deprive lessees and guarantors of their day in court. Yoshida v. PC Tech U.S.A. & You-Ri, Inc., 22 A.D.3d at 373. See GE Oil & Gas, Inc. v. Turbine Generation Servs., L.L.C., 140 A.D.3d at 583; Camacho v. IO Practiceware, Inc., 136 A.D.3d at

416; Public Adm'r Bronx County v. Montefiore Med. Ctr., 93 A.D.3d at 621; Sterling Natl. Bank v. Eastern Shipping Worldwide, Inc., 35 A.D.3d at 222.

The claims by the attorney respondents that they recommended for trial only 484 of 2,692 cases flagged, occasionally recommend vacating default judgments or discontinuing actions voluntarily when guarantors raise defenses, and refrain from collecting attorneys' fees for default judgments because it is impractical fare no better. The actions that do proceed to default judgments arising from unsupervised fraud are still repeated and persistent. State of New York v. Princess Prestige Co., 42 N.Y.2d at 107. They do not include, moreover, the many actions that lessees and guarantors settled to stop harassing collection communications, to remove negative credit reports, or to avoid or end lawsuits and avoid entry of judgment.

Finally, the attorney respondents do not deny that Babad participated in their collection litigation. His status as an employee does not remove him from the application of Executive Law § 63(12). See People v. Northern Leasing Sys., Inc., 169 A.D.3d at 531; People v. Greenberg, 21 N.Y.3d at 447.

V. VACATING DEFAULT JUDGMENTS OBTAINED BY FRAUD

Petitioner Judge Silver seeks to vacate the default judgments that respondents obtained in their actions to recover damages for breach of the EFLs.

> An administrative judge, upon a showing that default judgments were obtained by fraud, misrepresentation, illegality, unconscionability, lack of due service, violations of law, or other illegalities or where such default judgments were obtained in cases in which those defendants would be uniformly entitled to interpose a defense predicated upon but not limited to the foregoing defenses, and where such default judgments have been obtained in a number deemed sufficient by him to justify such actions set forth herein, and upon appropriate notice to counsel for the respective parties, or to the parties themselves, may bring a proceeding to relieve a party or parties from them upon such terms as may be just.

C.P.L.R. § 5015(c). See Shaw v. Shaw, 97 A.D.2d 403, 404 (2d Dep't 1983); Mead v. First Trust & Deposit Co., 60 A.D.2d 71, 74 (4th Dep't 1977). This provision, formerly codified in New York Judiciary Law § 217-a, was designed to address the very circumstances now before the court. Shaw v. Shaw, 97 A.D.2d at 404; Mead v. First Trust & Deposit Co., 60 A.D.2d at 74.

As set forth above, respondents' use of the EFLs' mail service provision demonstrates that this form of notice to defendants of respondents' actions was ineffective, confirmed by lessees' and guarantors' accounts of nonreceipt or late receipt of notice of the action and by respondents' default judgments

against lessees or guarantors in 71% of their actions from 2010 to 2017. Yoshida v. PC Tech U.S.A. & You-Ri, Inc., 22 A.D.3d at 373. See GE Oil & Gas, Inc. v. Turbine Generation Servs., L.L.C., 140 A.D.3d at 583; Camacho v. IO Practiceware, Inc., 136 A.D.3d at 416; Public Adm'r Bronx County v. Montefiore Med. Ctr., 93 A.D.3d at 621; Sterling Natl. Bank v. Eastern Shipping Worldwide, Inc., 35 A.D.3d at 222. Petitioners' evidence thus demonstrates "lack of due service" under C.P.L.R. § 5015(c).

The Northern Leasing respondents contend that laches bar Judge Silver's claim. Laches is an equitable bar based on lengthy neglect in claiming a right that causes prejudice to another party. Saratoga County Chamber of Commerce v. Pataki, 100 N.Y.2d 801, 816 (2003); Reif v. Nagy, 175 A.D.3d 107, 130 (1st Dep't 2019); Matter of Linker, 23 A.D.3d 186, 189 (1st Dep't 2009). Therefore, to establish laches, the Northern Leasing respondents must demonstrate prejudice from the delay. Saratoga County Chamber of Commerce v. Pataki, 100 N.Y.2d at 816; Reif v. Nagy, 175 A.D.3d at 130; Bank of Am. N.A. v. Lam, 124 A.D.3d 430, 431 (1st Dep't 2015); Matter of Linker, 23 A.D.3d at 189. They may show prejudice by a concrete injury, a changed position, lost evidence, or another disadvantage from the delay. Reif v. Nagy, 175 A.D.3d at 130; Matter of Linker, 23 A.D.3d at 189. The

Northern Leasing respondents may not raise laches, however, as a defense against the State enforcing a public right or protecting a public interest. Capruso v. Village of Kings Point, 23 N.Y.3d 631, 641-42 (2014); Donn Gerelli Assoc. Ins. Agency, Inc. v. Lawsky, 151 A.D.3d 424, 425 (1st Dep't 2017); State v. Astro Shuttle Arcades, 221 A.D.2d 198, 198 (1st Dep't 2005).

Even if Judge Silver were not considered a State official, laches would not apply because Judge Silver and his predecessor, the original petitioner Judge Fisher, did not unreasonably or unfairly delay seeking to vacate the default judgments. Passage of time is necessary to a claim under C.P.L.R. § 5015(c), because "default judgments . . . obtained in a number deemed sufficient . . . to justify . . . actions to relieve a party or parties from them" require time to accumulate. C.P.L.R. § 5015(c). The Northern Leasing respondents' claimed prejudice of lost profits from years of acceptance of their practices by the New York County Civil Court is not cognizable prejudice, because that loss is the object of the very relief petitioners seek under § 5015(c).

Consequently, the 29,617 default judgment respondents "obtained by fraud, misrepresentation, [and] illegality" in the EFLs being enforced, followed by "lack of due service," to the

extent not already vacated, must be vacated. C.P.L.R. § 5015(c). Since the EFLs' provisions for lack of due service and for suit in a cost prohibitive, faraway forum have generated these default judgments, the EFLs may not be enforced as written. Therefore the actions in which the default judgments are vacated also must be dismissed with prejudice.

To the extent that attorneys' fees are included in the amounts recovered based on these default judgments, the attorney respondents are liable along with their co-respondents under C.P.L.R. § 5015(c). See Mead v. First Trust & Deposit Co., 60 A.D.2d at 75. Lessees and guarantors present correspondence from the attorney respondents demanding payment and including attorneys' fees along with the EFL payments and interest due in the total amount demanded.

VI. APPLICABLE STATUTES OF LIMITATIONS

Since petitioners' evidence supports the Northern Leasing respondents' liability for fraud under Executive Law § 63(12) and not under common law, the limitations period of three years applies to this claim. C.P.L.R. § 214(2); State of New York v. Daicel Chem. Indus. Ltd., 42 A.D.3d 301, 303 (1st Dep't 2007). See Schneiderman v. Credit Suisse Sec. (USA) LLC, 31 N.Y.3d 622, 634 (2018); People v. Trump Entrepreneur Initiative LLC, 137

A.D.3d 409, 418 (1st Dep't 2016). No limitations period applies to petitioners' claim under C.P.L.R. § 5015(c). People v. Northern Leasing Sys., Inc., 169 A.D.3d at 530.

VII. CORPORATE DISSOLUTION

As a final component of relief, petitioners seek to dissolve Northern Leasing Systems, Inc., 60 days after it pays the damages from all other claims.

> The attorney-general may bring an action for the dissolution of a corporation upon one or more of the following grounds:
>
> . . . .
>
> (2) That the corporation has exceeded the authority conferred upon it by law, or has violated any provision of law whereby it has forfeited its charter, or carried on, conducted or transacted its business in a persistently fraudulent or illegal manner, or by the abuse of its powers contrary to the public policy of the state has become liable to be dissolved.

BCL § 1101(a) (emphasis added). See State of New York v. Cortelle Corp., 38 N.Y.2d at 87; People v. Oliver Schools, 206 A.D.2d 143, 145 (4th Dep't 1994). "Section 1101 merely vests in the Attorney-General, or merely only codifies, his standing to vindicate the State's right and provides for dissolution of the corporate abuser of the State's grant of corporate existence." State of New York v. Cortelle Corp., 38 N.Y.2d at 88.

The court has rejected the Northern Leasing respondents'

contentions that their conduct is legitimate because the EFLs of which lessees complain are only a small fraction of their total EFLs and that a trial is required on petitioners' claim for dissolution under BCL § 1101(a) as well as on their claim under Executive Law § 63(12). The court's finding that the Northern Leasing respondents committed persistent fraud under Executive Law § 63(12) necessarily also rejects the Northern Leasing respondents' contention that the lessees' complaints are business disputes that do not evince a public menace. Having established that respondents engaged in "persistent fraud or illegality in the carrying on, conducting or transaction of business" in violation of Executive Law § 63(12), petitioners also have established that respondent Northern Leasing Systems, Inc., "carried on, conducted or transacted its business in a persistently fraudulent or illegal manner" under BCL § 1101(a)(2). See People v. Oliver Schools, 206 A.D.2d at 147.

VIII. DISPOSITION

In sum, petitioners have established their claim of fraud or illegality under Executive Law § 63(12) and their claim under C.P.L.R. § 5015(c) against all respondents and their claim under BCL § 1101(a)(2) against respondent Northern Leasing Systems, Inc. The court grants a judgment on the petition as follows,

denies respondents a judgment dismissing the petition, denies the a trial on the petition, and denies their motion for disclosure regarding liability, without prejudice to a future motion for disclosre regarding restitution. C.P.L.R. §§ 408, 409(b), 410.

The court awards restitution to lessees and guarantors for respondents' fraudulent acts from April 11, 2013, to the present. C.P.L.R. § 214(2); People v. Applied Card Sys., Inc., 11 N.Y.3d 105, 125 (2008); State of New York v. Ford Motor Co., 74 N.Y.2d 495, 502 (1989). See State of New York v. Astro Shuttle Arcades, 221 A.D.2d at 198. Restitution is for the extent of injury related to respondents' deception. People v. Applied Card Sys., Inc., 41 A.D.3d 4, 8-9 (3d Dep't 2007), aff'd, 11 N.Y.3d 105 (2008). The court retains discretion to determine the amount of harm attributable to each of the Northern Leasing respondents' and attorney respondents' deceptive acts. Id. The court will determine the amount of restitution after a hearing. People v. Imported Quality Guard Dogs, Inc., 88 A.D.3d 800, 802 (2d Dep't 2011). Respondents shall provide to petitioners an accounting of the names and addresses of all lessees and guarantors from whom respondents have collected funds claimed to be owed under EFLs and the amounts collected from each lessee and guarantor since April 11, 2013, and notify these lessees and guarantors of their

right to apply for restitution, unless the parties agree to a different procedure for notice. State of New York v. Princess Prestige Co., 42 N.Y.2d at 108; People v. General Elec. Co., 302 A.D.2d at 316.

The court also awards disgorgement, a remedy under Executive Law § 63(12) distinct from restitution, requiring respondents' return of wrongfully obtained profits. People v. Greenberg, 27 N.Y.3d at 497; People v. Applied Card Sys., 11 N.Y.3d at 125; People v. Ernst & Young LLP, 114 A.D.3d 569, 569 (1st Dep't 2014). While petitioners identify no such profit obtained by the Northern Leasing respondents, petitioners request and the court grants disgorgement by the attorney respondents of their attorneys' fees collected in any collection actions on the Northern Leasing respondents' behalf from April 11, 2013, to the present, to be disbursed to the defendants from whom the fees were collected. C.P.L.R. § 214(2); People v. Greenberg, 27 N.Y.3d at 497-98; People v. Applied Card Sys., 11 N.Y.3d at 125; People v. Ernst & Young, 114 A.D.3d at 570.

Petitioners also request a permanent injunction against respondents, which does not require proof of irreparable harm, People v. Greenberg, 27 N.Y.3d at 497, or a high percentage of violations in respondents' operations. State of New York v.

Princess Prestige Co., 42 N.Y.2d at 107. Since Executive Law § 63(12) is remedial legislation on the State's behalf to prevent fraud, People v. Lexington Sixty-First Assoc., 38 N.Y.2d 588, 598 (1976), and petitioners show a reasonable likelihood of continuing violations based on totality of the circumstances, People v. Greenberg, 27 N.Y.3d at 496-97, the court permanently enjoins respondents from conducting the business of equipment finance leasing or collection of debts under equipment finance leases and from purchasing, financing, transferring, servicing, or enforcing equipment finance leases. People v. Imported Quality Guard Dogs, Inc., 88 A.D.3d at 801-802. See People v. Coventry First LLC, 13 N.Y.3d at 114; State of New York v. Fashion Place Assoc., 224 A.D.2d 280, 282 (1st Dep't 1996).

Since the Northern Leasing respondents procured their equipment finance leases through fraud under Executive Law § 63(12), the court rescinds their equipment finance leases entered from April 11, 2013, to the present. See People v. Coventry First LLC, 13 N.Y.3d at 113.

The court also vacates the default judgments obtained by respondents Northern Leasing Systems, Inc., Lease Finance Group LLC, MBF Leasing LLC, Lease Source-LSI, LLC a/k/a Lease Source, Inc., and Golden Eagle Leasing LLC against equipment finance

lessees or their guarantors in actions commenced in New York City Civil Court, New York County.

The court awards to petitioners their costs and disbursements, C.P.L.R. §§ 8101, 8201, 8301, upon their filing of a bill of costs, and a discretionary allowance of $2,000.00 against each respondent. C.P.L.R. § 8303(a)(6); People v. Parker, 47 A.D.2d 611, 611 (1st Dep't 1975). See State of New York v. Spodex, 89 A.D.2d 835, 835-36 (1st Dep't 1982).

Within 60 days after implementation of the above relief, respondent Northern Leasing Systems, Inc., shall dissolve. BCL § 1101(a)(2).

This decision constitutes the court's order and judgment. The Clerk shall enter a judgment accordingly. The court will arrange a telephone conference with all parties June 22, 2020, at 3:00 p.m., to address the procedures for a hearing on restitution.

DATED: May 29, 2020

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.