

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 85R**

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**In the Matter of the Inquiry by LETITIA JAMES,
Attorney General of the State of New York,**

Petitioner,

**Pursuant to Article 23-A of the New York General
Business Law in regard to the acts and practices of**

Index No. 451652/2021

**EASTMAN KODAK COMPANY and
JAMES V. CONTINENZA,**

Respondents,

**in promoting the issuance, distribution, exchange,
advertisement, negotiation, purchase, investment advice
or sale of securities in or from New York State.**

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ELIZABETH SHAMAHS, SPECIAL REFEREE:

On June 15, 2021, the Honorable Barbara James issued an *Ex Parte* Order pursuant to General Business Law (GBL) § 354. In part, Justice James ordered that:

“Respondent Continenza appear before Special Referee Elizabeth Shamahs of the Supreme Court, or any other Justice or Referee of this Court as may be directed, at Part 85R in Room 324, at the courthouse located at 60 Centre Street, New York, New York, or at any other place as this Court may direct, on the 1st of October 2021 at 10:00 a.m., and on any adjourned date and time thereafter or on such other date stipulated by the parties or directed by the assigned Referee, to testify under oath and answer such questions as may be put to him by the Attorney General or a designated Assistant Attorney General; and it is further

ORDERED that Respondent Kodak produce Kodak General Counsel Roger Byrd to appear before the Special Referee Elizabeth Shamahs of the Supreme Court, or any other Justice or Referee of this Court as may be directed, at Part 85R in Room 324, at the courthouse located at 60 Centre Street, New York, New York, or at any other place as this Court may direct, on the 24th of September 2021, at 10:00 a.m., and on any adjourned date and time thereafter, or on such date stipulated by the parties or directed by the assigned Referee, to testify under oath and answer such questions as may be put to him by the Attorney General or a designated Assistant Attorney General.”

On September 9, 2021, the attorneys for Respondents, namely Stephen L. Cohen, Esq, and Michael A. Levy, Esq. of Sidley Austin LLP, Counsel for Roger W. Byrd; Sean Hecker,

Esq. and Shawn G. Crowley, Esq. of Kaplan Hecker & Fink LLP, Counsel for James V. Continenza; Michael A. Asaro, Esq. of Akin Gump Strauss Hauer Fied LLP, Counsel for Eastman Kodak Company; and John P. Nowak, Esq. of Paul Hastings LLP, issued and emailed a statement to Special Referee Shamahs opposing the “Attorney General’s proposal that the pre-action examinations in this matter should be conducted publicly in an open courtroom or by a publicly available video conference.”

Respondents argued that “[t]here is no legal authority or apparent precedent for the examinations to be conducted publicly.” GBL § 354 does not use the term “public” but, instead calls for the transcript of the examination to be filed with the Court after the examination has concluded. While the case law distinguishes confidential and public investigations, there is no precedent ruling that the examinations of witnesses be conducted publicly. Additionally, the attorneys for Respondents pointed out that the Attorney General’s prior practice was to hold such examinations without public attendance.

Respondents further argued that “[p]ublic examination would be neither fair nor appropriate.” They point out that there is no legitimate reason for the examination to be public. Furthermore, “[c]ontemporaneous public access to the examination also presents a significant risk of unnecessarily and improperly disclosing Kodak’s confidential business information, including potential trade secrets.”

The Attorney General, through her Assistant Attorneys General, Jeffrey A. Novack, Esq. and Melissa Gable, Esq. submitted a response which was emailed to Special Referee Shamahs on September 13, 2021, insisting that §354 of the Martin Act requires that the investigative examinations be accessible to the public.

Petitioner argued that investigative examinations can be open to the public pursuant to case law which distinguishes §354 proceedings as “public” and §352 proceedings as “confidential” or “private.” Petitioner’s position is investigative examinations conducted pursuant to the Martin Act under §354 require judicial supervision and, therefore, are akin to judicial proceedings, or court “sittings” which are open to the public. Petitioner surmises that the June 15, 2021 *Ex Parte* Order permits public access to the investigative examination as it directs the examinations “to be held at the Courthouse, or another place directed by the Court.” If the investigative examination is held outside the courthouse or virtually, it would not preclude public access. Petitioner further indicates that Respondents’ arguments wherein the Civil Practice Laws and Rules (CPLR) are cited are not applicable and no basis has been made for their “conclusory assertions that the examinations could expose sensitive business information or information of a personal nature.” Furthermore, Petitioner proposed if the latter was to happen, Respondents may object to a “question which implicates sensitive information” and the Referee will rule on the objection. Finally, Petitioner argued that “this is a case that calls out for public accessibility particularly given Kodak’s repeated public attempts to whitewash the events at issue.”

A telephone conference with Assistant Attorneys General Jeffrey A. Novack and Melissa Gable, and their Fall Extern, Ryan Ellington; Respondents’ attorneys Michael Asaro and Stephanie Lindemuth, of Akin Gump Strauss Hauer Feld LLP for Eastman Kodak Company;

John Nowak and Katherine Solomon of Paul Hastings LLP for James V. Continenza, Sean Hecker and Shawn Crowley of Kaplan Hecker & Fink LLP, for James V. Continenza; Stephen Cohen, Michael Levy, and Paul Bello of Sidley Austin LLP for Roger W. Byrd; and Special Referee Shamahs was held on September 13, 2021. The conference was not held on the record. Both sides reiterated their positions and were given the opportunity to be heard regarding the issue as to whether the examinations of Respondent James Continenza and Kodak General Counsel Roger Byrd should be open to the public. Both sides stipulated that Special Referee Shamahs should make the ruling which would be placed on the record on September 23, 2021.

Additional submissions were made, via e-mail, by Respondents' counsel on September 14, and 21, 2021 and by the Attorney General on September 20, and 22, 2021. Upon this aforementioned record, the following is the decision and order of this court:

GBL § 354 provides:

Whenever the attorney-general has determined to commence an action under this article, he may present to any justice of the supreme court, before beginning such action, an application in writing for an order directing the person or persons mentioned in the application to appear before the justice of the supreme court or referee designated in such order and answer such questions as may be put to them or to any of them, or to produce such papers, documents and books concerning the alleged fraudulent practices to which the action which he has determined to bring relates, and it shall be the duty of the justice of the supreme court to whom such application for the order is made to grant such application. The application for such order made by the attorney-general may simply show upon his information and belief that the testimony of such person or persons is material and necessary. The provisions of the civil practice law and rules, relating to an application for an order for the examination of witnesses before the commencement of an action and the method of proceeding on such examination, shall not apply except as herein prescribed. The order shall be granted by the justice of the supreme court to whom the application has been made with such preliminary injunction or stay as may appear to such justice to be proper and expedient and shall specify the time when and place where the witnesses are required to appear. The justice or referee may adjourn such examination from time to time and witnesses must attend accordingly. The testimony of each witness must be subscribed by him and all must be filed in the office of the clerk of the county in which such order for examination is filed.

This statute itself does not indicate that the examination of witnesses appearing before the justice of the supreme court or designating referee shall be or may be public. This section only states that the examination must be before a justice of the supreme court or a designated referee. Moreover, GBL § 354 does state that “[t]he testimony of each witness must be subscribed by him and all must be filed in the office of the clerk of the county in which such order for examination is filed.” Thus, the transcripts of the judicial supervised examinations of Mr. Continenza and Mr. Byrd must be filed with New York County Supreme Court. The public will

be apprised of the judicially supervised examination by the filing of the transcript in accordance with GBL § 354. This was the legislative intent for the requirement of the filing of the transcripts. There is no language in the statute that the examinations be conducted publicly.

GBL § 355 sets forth the procedure for a justice of the supreme court to grant a proceeding under the Martin Act GBL §354. GBL §355 provides that:

The order for such examination must be signed by the justice making it and service of a copy thereof with an endorsement by the attorney-general signed by him or his deputy, to the effect that the person named therein is required to appear and be examined at the time and place and before the justice or referee specified in such endorsement, shall be sufficient notice for the attendance of witnesses. Such endorsement may contain a clause requiring such person to produce at such examination all books, papers and documents in his possession or under his control relating to the subject of such examination. The order shall be served upon the person named in the endorsement aforesaid by delivering to and leaving with him a certified copy thereof, endorsed as above provided, subject to the payment of witness fees and mileage as and when provided to be paid by section three hundred fifty-two, subdivision three of this article in connection with attendance pursuant to subpoenas authorized to be issued under said action. Service of an order pursuant to section three hundred fifty-four of this article may be made under section three hundred fifty-two-b of this article in cases falling thereunder.

Accordingly, while the *Ex Parte* Order granted the examinations of Mr. Continenza and Mr. Byrd pursuant to GBL § 354, nowhere in said order does Justice James direct that the examinations be public. Justice James did not explicitly issue procedures for a publicly held examination of Respondents nor did she set forth that the examinations shall be public. Hence, a publicly held investigative examination is beyond the scope of Justice James' *Ex Parte* Order. Further, it does not appear that the Attorney General ever proposed that the examination be publicly held in her application before Justice James.

Moreover, the Attorney General has not persuasively demonstrated that an investigative examination itself be publicly held pursuant to under GBL § 354. In fact, the case law presented by both sides simply shows the distinctions between GBL §§ 352 and 354, confidential and private versus public investigations. Nowhere, in the case law and articles provided by Petitioner and Respondents, has a court ruled specifically that the investigative examination shall be conducted publicly.

Assistant Attorney General Novack argued that the examination is not a deposition as described by Respondents but a judicially supervised examination under GBL §354 akin to a judicial proceeding or a "sitting of the court" pursuant to Judiciary Law § 4, thus a public proceeding. The Court disagrees. An investigative examination pursuant to GBL § 354 is pre-trial court supervised disclosure, not a hearing or trial open to public domain. This examination

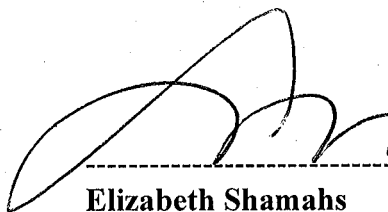
is a pre-commencement proceeding where there is no legal action filed or pending. Accordingly, the investigative examinations of Mr. Continenza and Mr. Byrd shall not be open to the public.

All arguments having been considered, it is hereby,

ORDERED that the Attorney General's proposal to conduct pre-action examinations publicly in an open courtroom, outside the courthouse, or by a publicly available video or virtual conference is denied.

With the consent of all counsel for the Special Referee to hear and determine this framed issue, the foregoing constitutes the decision and order of the court.

Dated: September 23, 2021



Elizabeth Shamahs
Special Referee

**ELIZABETH SHAMAHS
SPECIAL REFEREE**

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September 9, 2021

VIA EMAILSpecial Referee Elizabeth Shamahs
Supreme Court of the State of New York
60 Centre Street
Part 85R, Room 324
New York, NY 10007Re: In the Matter of Eastman Kodak Company & James V. Continenza, Index No.
451652/2021

Dear Special Referee Shamahs:

Respondents Eastman Kodak Company (“Kodak”) and James V. Continenza and witness Roger W. Byrd (collectively, the “Kodak Witnesses”) write in opposition to the Attorney General’s proposal that the pre-action examinations in this matter should be conducted publicly in an open courtroom or by a publicly available video conference. As detailed below, the Attorney General’s unusual proposal finds no support in the Court’s *Ex Parte* Order scheduling the examinations (the “Order”), in the text of the relevant section of the Martin Act, in cases applying the Martin Act, or in the Attorney General’s prior practice for conducting such examinations. The proposal also defies logic and common experience. Pretrial examinations are not conducted in public, and there is no legitimate purpose for doing so here. Indeed, doing so would present a real danger of unnecessarily revealing Kodak’s confidential business information. The Kodak Witnesses instead propose that the supervised examinations be conducted privately, like any other pretrial examination, subject to the Martin Act’s requirements that the examination be supervised by a judicial officer and that the transcripts—redacted as appropriate to protect Kodak’s confidential business information—be filed publicly after the fact. This approach has an added benefit in that it would avoid the unnecessary disclosure of any personal communications or information relating to the Kodak Witnesses and others.

I. Applicable Law

The Martin Act affords the Attorney General the ability to conduct two types of examinations—one under General Business Law Section 352 and the other under General Business Law Section 354. In Section 352 examinations, which are similar to grand jury examinations, witnesses have no right to neutral judicial oversight or supervision. *See First Energy Leasing Corp. v. Att’y Gen.*, 496 N.E.2d 875, 878 (N.Y. 1986) (stating that Section 354,

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unlike Section 352, has the “added protection of judicial supervision”). Witnesses are also generally not permitted to disclose information about the proceedings, Gen. Bus. Law § 352(5), and there is no requirement that the transcripts be publicly filed.

In contrast, Section 354 examinations—the type at issue here—are akin to pretrial depositions in connection with an anticipated Martin Act suit, differing principally only in that the statute provides witnesses with a right to neutral judicial oversight or supervision during the examination, Gen. Bus. Law § 354 (“[A]n order directing the person or persons mentioned in the application to appear before the justice of the supreme court or referee designated in such order and answer such questions as may be put to them or to any of them”); *see also, e.g., State v. Metz*, 671 N.Y.S.2d 79, 84 (App. Div. 1998) (noting that the Section 354 proceedings were held “under the auspices of a special referee”), and a transcript of the examination must be publicly filed, Gen. Bus. Law § 354 (“The testimony of each witness must be subscribed by him and all must be filed in the office of the clerk of the county in which such order for examination is filed.”).

II. Procedural Background

A. Issuance of the Order and Its Terms

Consistent with Section 354’s requirement of judicial supervision of any examination, the Order directs the Kodak Witnesses, in relevant part, to “appear before the Special Referee Elizabeth Shamahs of the Supreme Court . . . at Part 85R in Room 324, at the courthouse located at 60 Centre Street, New York, New York, or at any other place as this Court may direct,” on September 24th, 2021 (Byrd) and October 1, 2021 (Continenza), “to testify under oath and answer such questions as may be put to [them] by the Attorney General or a designated Assistant Attorney General.” (Order at 2.) The Order does not call for the public to have contemporaneous access to the examination, whether in person or through video conferencing.

B. Conversations with the Attorney General’s Office

Counsel for Kodak and Mr. Continenza participated in a meet-and-confer with representatives of the Attorney General’s Office (the “Attorney General’s Office”) on June 18, 2021. During that meeting, the Attorney General’s Office proposed that the examinations be conducted in an open courtroom accessible to the public or, if an open courtroom is not permitted due to COVID-19 restrictions, through a live stream video over the Internet. In a subsequent meet-and-confer on August 17, 2021, counsel for the Kodak Witnesses informed the Attorney General’s Office that they objected to that proposal, explaining that there was no support in the statute, the Order, case law, or prior precedent for conducting a Section 354 examination publicly. The Attorney General’s Office responded that it would consider the Kodak Witnesses’ position. On August 23, 2021, the Attorney General’s Office emailed the Kodak Witnesses that it “continue[d] to believe, based on case law and statutes, that any testimony should be open to the public regardless of whether it is held in the courtroom or virtually.” The Attorney General’s Office did not identify any of the case law or statutes on which it relied.

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Special Referee Elizabeth Shamahs
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III. Argument

A. There Is No Legal Authority or Apparent Precedent for the Examinations to Be Conducted Publicly

The Attorney General's proposal finds no support in the Order, in the text of the Martin Act, in the available case law, or in the Attorney General's prior practice for conducting such examinations.

As set forth above, the Order does not itself direct that the Section 354 examinations be conducted publicly. Instead, the Order simply directs the Kodak Witnesses to appear at a particular place (Part 85R in Room 324 at the courthouse at 60 Centre Street) at a particular time (10 a.m. on September 24 and October 1, 2021), to testify under oath and answer questions from the Attorney General or a designated Assistant Attorney General, under the supervision of Special Referee Elizabeth Shamahs.

The Order is consistent with the text of the Martin Act, which likewise does not call for examinations to be conducted publicly. Section 354 does not use the term "public," does not provide for examinations to be conducted in public, and does not prescribe public access or video conferencing. Section 354 provides only that the *transcript* of the examination will be filed with the court after the examination is conducted. Gen. Bus. Law § 354 ("The testimony of each witness must be subscribed by him and all must be filed in the office of the clerk of the county in which such order for examination is filed."); *see also First Energy Leasing Corp.*, 496 N.E.2d at 878 (adhering to the "plain language" of Section 354 when interpreting the scope of the statute).

Cases interpreting the Martin Act similarly do not support the Attorney General's invented proposal for a public examination. The only case cited by the Attorney General in its papers applying for the Order—*State v. 7040 Colonial Road Associates Co.*, 671 N.Y.S.2d 938 (Sup. Ct. 1998)—is one of a small number that use the word "public" when describing Section 354, but it does so only in passing to describe the *investigation*, not the *examination*. Specifically, the court in *7040 Colonial Road Assocs.* distinguished the "confidential investigations" that the Attorney General conducts under Section 352 from the "public investigations" that the Attorney General may pursue under Section 354. *Id.* at 942 ("The Attorney General may pursue his investigative goals either through confidential investigations conducted under compulsion of subpoena (GBL § 352) or through public investigations conducted pursuant to court order (GBL §§ 354, 355).").

Here, the Attorney General has already made full use of her authority under Section 354 to publicize her investigation. She has publicly announced the existence of the investigation,¹

¹ There is legitimate concern that the Attorney General intends to turn these examinations into public spectacles. When seeking the Order, the Attorney General used its petition filing as an opportunity to wage a negative public media campaign against Kodak and Mr. Continenza. The campaign included highly inflammatory press releases and accompanying tweets. *See, e.g.*, Press Release, N.Y. State Off. of the Att'y Gen., *Attorney General James Secures Court Order Forcing Kodak CEO to Publicly Testify on Insider Trading During COVID-19 Pandemic* (June 15,

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publicly accused Kodak and Mr. Continenza of misconduct, publicly sought leave to examine the Kodak Witnesses, and is required by Section 354 to publicly file the transcripts of the examinations of the Kodak Witnesses. But nothing about *7040 Colonial Rd. Assocs.* or any other case supports the Attorney General's claim that Section 354 permits or requires the additional and highly unusual spectacle of a judicially-ordered, public inquisition of the Kodak Witnesses. Public examinations during judicial proceedings are conducted almost exclusively in connection with evidentiary hearings or trials. If the Martin Act were intended to create a new, heretofore unheard of procedure for the Attorney General to engage in a public pillorying of witnesses for its own sake, one would expect the Martin Act and the cases interpreting it to say so clearly. They do not.

Nor does the Attorney General's prior practice suggest the existence of any such procedure. The lack of statutory or judicial authority for a public examination is conclusive on its own, irrespective of what the Attorney General may have done on prior occasions. But, in fact, we are unaware of a prior instance in which the Attorney General has conducted a Section 354 examination publicly. Conversely, we are aware of the Attorney General conducting Section 354 examinations non-publicly. In *Matter of Laurence G. Allen*, the Section 354 examination took place in the Attorney General's office without any public attendance. *See* Tr. at 1:7–10, :17–23, *In re Allen*, No. 452346/2018 (N.Y. Sup. Ct. Feb. 13, 2019), NYSCEF Doc. No. 82 (noting that the Section 354 examination was taken at the New York City Office of the Attorney General at 28 Liberty Street, New York, New York).

B. Public Examinations Would Be Neither Fair Nor Appropriate

Besides lacking legal precedent, the Attorney General's proposal to conduct the examinations in public does not serve any legitimate purpose. There is no reason to convert a pre-charge, pretrial examination akin to a deposition into a public event. The Martin Act does not establish some new kind of public-commission-type proceeding in which public examination of witnesses by the Attorney General is, itself, the ultimate purpose of the proceeding. Instead, like countless other statutory enforcement regimes, the Martin Act follows the ordinary course of permitting the Attorney General to bring Martin Act charges and prove her case at trial. As in any other matter, the trial is the public's opportunity to view the witnesses and the evidence. A Section 354 examination, in comparison, is merely a pretrial examination akin to a judicially-supervised deposition, and such depositions are not traditionally public because there are no legitimate reasons for them to be. The Attorney General's highly inflammatory public statements

2021), <https://ag.ny.gov/press-release/2021/attorney-general-james-secures-court-order-forcing-kodak-ceo-publicly-testify> ("Today's order will force Mr. Continenza and Kodak's general counsel to testify in open court, where the facts will be exposed before the American people."); Press Release, N.Y. State Off. of the Att'y Gen., *Attorney General James Asks Court to Force Kodak CEO to Publicly Testify on Insider Trading During COVID-19 Pandemic* (June 1, 2021), <https://ag.ny.gov/press-release/2021/attorney-general-james-asks-court-force-kodak-ceo-publicly-testify-insider>; NY AG James (@NewYorkStateAG), TWITTER (June 15, 2021, 5:20 PM), <https://twitter.com/newyorkstateag/status/1404911791424131075> ("The facts will now be laid bare before the American people as we continue our work to hold those who violate the law accountable.").

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about this matter and the upcoming testimonies, before any charges have been filed, should be cause for concern regarding the motives of a public examination.

Contemporaneous public access to the examinations also presents a significant risk of unnecessarily and improperly disclosing Kodak's confidential business information, including potential trade secrets. In the civil discovery context, such information could only be disclosed upon a showing by the requesting party that the information is "indispensable to the ascertainment of truth and cannot be acquired in any other way." *Ferolito v. Ariz. Beverages USA, LLC*, 990 N.Y.S.2d 218, 220 (App. Div. 2014) (reversing trial court's order to produce documents which contained trade secrets pursuant to CPLR 3104(d)); *Curtis v. Complete Foam Insulation Corp.*, 498 N.Y.S.2d 216, 217 (App. Div. 1986) (observing that the CPLR's liberal discovery rules are modified in the context of trade secrets in civil litigation, "due in part to the important public benefits in protecting trade secrets"); see also *Matter of Abrams*, 611 N.Y.S.2d 422, 425 (Sup. Ct. 1994) (holding that CPLR provisions relating to subpoenas and their enforcement apply to subpoenas issued under the Martin Act as well). The only way to protect such information from unnecessary disclosure is to conduct the testimony without contemporaneous public access. Such a procedure would afford the Special Referee the opportunity to review the transcript, with the input of Kodak's counsel, prior to its required public filing to determine if certain information is "confidential in nature, or information which is subject to abuse if widely disseminated" and, if so, to apply appropriate judicial safeguards. *McLaughlin v. G. D. Searle, Inc.*, 328 N.Y.S.2d 899, 900 (App. Div. 1972) (granting motion for CPLR 3103 protective order requesting that any party to the action be barred from disclosing business or trade secrets or "any other confidential material disclosed upon the examination to anyone" not directly involved in the case). Conducting the testimony without contemporaneous public access also avoids the risk of unnecessarily disclosing any personal communications or information that, while unrelated to the Attorney General's investigation, may be of a private nature and concerns the Kodak Witnesses and others.

IV. Request for Relief

The Special Referee has been delegated authority to determine the procedures that govern Section 354 examinations. Gen. Bus. Law § 354; see also, e.g., *James v. iFinex, Inc.*, No. 450545/2019, 2019 WL 3891172, at *9 (N.Y. Sup. Ct. Aug. 19, 2019) ("At a minimum, the Court (via the Special Referee) retains authority to oversee implementation of its Order."), *aff'd*, 127 N.Y.S.3d 456 (2020). For the reasons discussed above, we respectfully request that the Special Referee reject the Attorney General's unusual proposal to conduct the examinations of the Kodak Witnesses publicly.

We appreciate your consideration.

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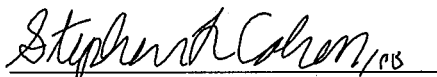
Special Referee Elizabeth Shamahs
September 9, 2021

Respectfully submitted,

/s/ John P. Nowak

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/s/ Michael A. Asaro

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Assistant Attorney General
Office of the Attorney General, State of New York
Counsel for Petitioner



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

DIVISION OF ECONOMIC JUSTICE

September 13, 2021

Via electronic mail to: eshamahs@nycourts.gov

Re: In the Matter of Eastman Kodak Company & James V. Continenza, Index No. 451652/2021

Dear Special Referee Shamahs:

We represent the People in the above-referenced matter. We write in response to Respondents' September 9, 2021 letter.

In the letter, Respondents assert that the upcoming court-supervised examinations of Kodak General Counsel Roger Byrd and Kodak Chairman and Chief Executive Officer James Continenza should be conducted privately. Respondents are wrong. Consistent with the Martin Act, N.Y. Gen. Bus. Law §§ 352 *et seq.*, the long-standing presumption of open judicial proceedings, and the Court's June 15, 2021 order, these judicially supervised examinations should be accessible to the public.

1. Treatment of the investigative examinations as open to the public is in accord with case law on the Martin Act.

The Martin Act provides the Attorney General with two bases for investigative examinations of witnesses: (1) judicially supervised examinations under court order pursuant to Section 354 (the basis for this proceeding); and (2) examinations pursuant to a subpoena issued by the Attorney General under Section 352. N.Y. Gen. Bus. Law §§ 352, 354.

New York courts consistently describe §354 proceedings as "public" and distinguish them from Section 352 proceedings which are described as "confidential" or "private." *People v. 7040 Colonial Rd. Assocs. Co.*, 176 Misc. 2d 367, 370 (N.Y. Sup. Ct. 1998) (recognizing that the General Business Law permits the Attorney General to investigate Martin Act violations "either through confidential investigations conducted under compulsion of subpoena" under GBL § 352 "or through public [Court supervised] investigations conducted pursuant to court order" under GBL § 354); *People v. Eichner*, No. 451536/2014, 2016 WL 3057994, at *4 (N.Y. Sup. Ct. May 26, 2016) ("The Martin Act authorizes the Attorney-General to conduct investigations in private or in public."); *see also Matter of Abrams*, 160 Misc. 2d 824, 827, 611 N.Y.S.2d 422, 424 (Sup. Ct. 1994) (describing a 354 examination as a "public examination").

The fact that the Legislature created two distinct sections of the Martin Act that provide the Attorney General with pre-action investigative examination authority demonstrates the Legislature's intent to create

two different types of pre-action investigative examinations, one “confidential” (§352) and one “public” (§354). Treating them both the same for the purposes of public access to the proceeding would defy this plain legislative intent.

2. Judiciary Law Section 4 requires that these court-supervised examinations be accessible to the public.

Under Judiciary Law Section 4, “[t]he sittings of every court within this state shall be public, and every citizen may freely attend the same.” *Matter of James Q.*, 32 N.Y.3d 671, 676–77 (2019). The statute reflects New York’s “long-standing, sound public policy that all judicial proceedings, both civil and criminal, are presumptively open to the public” *Id.* (quotations omitted). Closure of a courtroom requires “a finding that compelling interests justify closure or partial closure.” *Kent v. Kent*, 810 N.Y.S.2d 160, 170 (1st Dep’t 2006).

Here, the Court will plainly be “sitting” during the scheduled investigative examinations and thus subject to Judiciary Law Section 4. This is because the investigative examinations are being conducted pursuant to Martin Act Section 354, which mandates that testimony be taken “before [a] justice of the supreme court” or designated referee. GBL Section 354; *First Energy Leasing Corp. v. Att’y-Gen.*, 68 N.Y.2d 59, 64(1986) (requiring judicial supervision of 354 examinations). The posture is therefore very different from traditional examinations before trial, which are not considered court sittings, but “private matters between the parties.” *Scollo v. Good Samaritan Hosp.*, 572 N.Y.S.2d 730, 732 (2d Dep’t 1991).

3. The Court’s June 15, 2021 Order contemplates public access to the examinations.

The Court’s June 15, 2021 Order directs that the examinations be held at the Courthouse, or another place directed by the Court. Docket No. 9 at p. 2 (ordering Byrd and Continenza “appear before the Special Referee Elizabeth Shamahs . . . at Part 85R in Room 324, at the courthouse located at 60 Centre Street, New York, New York or at any other place as this Court may direct”).

4. The fact that one prior 354 examination has been physically held outside the Courthouse is irrelevant.

Holding examinations outside the Courthouse does not preclude public access in the event there is public interest in the proceeding. Here, in contrast, we anticipate that the examinations will be held virtually in light of the ongoing Covid-19 pandemic, and the parties are preparing a stipulation to that effect. In this virtual setting, accommodation must be made to allow for public access.

5. Respondents provide no basis to conclude that there is a compelling interest warranting closure of the proceedings.

Respondents rely on: (a) cases applying the C.P.L.R. in the civil litigation context, authority that has no force here in the public 354 examination context to which the C.P.L.R. “does not apply,” and which calls for a transcript of the proceedings to be made public; and (b) conclusory assertions that the examinations could expose sensitive business information or information of a personal nature. We do not anticipate either of these concerns being an issue during the examinations and Respondents have put forth no basis for the court to find otherwise. Instead, Respondents are free to raise this issue if and when a question is

asked which implicates sensitive information. At that time Respondents may interpose an objection and the referee may make a ruling.

6. Finally, beyond the general presumption of open judicial proceedings, this is a case that calls out for public accessibility particularly given Kodak's repeated public attempts to whitewash the events at issue.

The case centers on Continenza's June 2020 purchase of Kodak stock. Kodak is based in Rochester, New York and is publicly traded on the New York Stock Exchange. Continenza made the purchase shortly after Kodak had filed a nonpublic application for a \$655 million loan from the federal government, following extensive dealings with the White House and other federal officials, all of which were confidential. Later, in July 2020, when Kodak publicly announced that it had signed a letter of interest with the federal Government, the announcement garnered substantial public attention and Kodak's share price skyrocketed. In September 2020, following public scrutiny of the potential loan and Continenza's stock purchase, Kodak's counsel publicly issued a 75-page special report purporting to exonerate Continenza of any wrongdoing. Then, during the Attorney General's investigation, Kodak made two separate public filings shortly before its annual shareholder meeting, in which it falsely stated that Continenza's purchase was "in compliance with the Company's insider trading policy" Yet, now Kodak seeks to keep relevant facts and information from public view. These circumstances are precisely the reason that a public examination option pursuant to § 354 exists.

* * *

At bottom, this investigation concerns a publicly traded New York based company, high-profile dealings with the federal government, and Kodak's own repeated public effort to exonerate its CEO of allegations of wrongdoing through its special report and false securities filings. The investigation, which has been the subject of significant media attention¹, is plainly a matter of public interest and concern. And public examinations as required by the relevant statutes set forth above will help set the record – muddied by Kodak – straight.

We thank the Court for its consideration of this matter.

Respectfully submitted,

/s/ Jeffrey A. Novack

Jeffrey A. Novack

Melissa Gable

Assistant Attorneys General

cc: All Counsel (By E-Mail)

¹ See, e.g., <https://www.wsj.com/articles/kodak-says-new-york-attorney-general-has-threatened-lawsuit-11621300131>; <https://www.cnbc.com/2021/06/01/ny-attorney-general-james-demands-kodak-ceo-testify-on-alleged-insider-trading.html>; <https://news.bloomberglaw.com/us-law-week/kodaks-ceo-top-lawyer-must-testify-in-ny-insider-trading-probe>.

Elizabeth Shamahs

From: Levy, Michael <mlevy@sidley.com>
Sent: Tuesday, September 14, 2021 9:22 PM
To: Elizabeth Shamahs
Cc: Melissa.Gable@ag.ny.gov; Novack, Jeffrey; Goldstein, Katherine; Asaro, Michael; Thrasher, Cristina; Chin, Kristen; Cohen, Stephen L.; Bello, Paul J.; johnnowak@paulhastings.com; Solomon, Katherine K.; Lindemuth, Stephanie; Sorkin, Joseph L.; Sean Hecker; Shawn G. Crowley
Subject: James v. Kodak & Continenza, Index No. 451652/2021 - Citations from Conference

Special Referee Shamahs,

During yesterday's conference, I made reference to various relevant judicial decisions that we had been able to identify in the hours since the Attorney General's submission of its letter earlier in the day. Because the parties had an opportunity to discuss the disputed issue with you fully at the conference, the Kodak parties do not seek leave to submit a reply to the Attorney General's submission. But for your convenience, attached please find citations to the decisions on three subjects.

First, cases demonstrating that, contrary to the Attorney General's assertions, judicial appointment of a special referee to supervise a pretrial examination like the one here does not turn that examination into a public event, because special referees are regularly appointed by judges to oversee non-public pretrial examinations like depositions. *See, e.g., Slapo v. Winthrop Univ. Hosp., et al.*, 130 N.Y.S.3d 478, 480 (App. Div. Sept. 2, 2020) (affirming appointment of special referee to supervise deposition); *K.S., et al. v. City of New York, et al.*, 867 N.Y.S.2d 516, 517 (App. Div. Nov. 12, 2008) (remitting with instruction to appoint referee to supervise deposition); *Laddcap Value Partners, LP v. Lowenstein Sandler P.C.*, 2017 WL 4901555, at *7 (Sup. Ct. Dec. 5, 2007) (appointing referee to supervise further depositions at the courthouse).

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Finally, in response to the Attorney General's unusual contention that there is no inconsistency between its current position that Martin Act examinations must be conducted publicly and its longstanding practice of conducting such examinations in the private setting of its offices, a leading case from the Second Circuit demonstrating that *if* Martin Act examinations actually *were* intended to be open to the public (which they are not), the Attorney General's regular practice of conducting them instead at its offices to which the public has no expectation of ready access would mean the Attorney General has over the years been repeatedly violating the law. *See United States v. Alcantara*, 396 F.3d 189, 202 (2d Cir. 2005) (rejecting government's contention that proceeding conducted in judge's robing room had been open "to the public," because "[m]embers of the public understand that they are free to enter a courtroom" but "[m]ost would not view a judge's robing room as a space to which they have a right of access" and "[i]t seems quite unlikely that a spectator in the courtroom would have felt at liberty to follow the parties into the robing room").

Best,

Mike Levy

MICHAEL A. LEVY

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**

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STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

DIVISION OF ECONOMIC JUSTICE

September 20, 2021

By E-Mail

Special Referee Elizabeth Shamahs
Supreme Court, New York County
60 Centre Street, Room 324
New York, NY 10007
eshamahs@nycourts.gov

Re: *In the Matter of Eastman Kodak Company & James V. Continenza*
Index No. 451652/2021

Dear Special Referee Shamahs:

We write to supplement our September 13, 2021 letter submission and to respond to the case law identified in Respondents' September 14, 2021 e-mail to the Court.

First, the statute and case law make it clear that there is a public right of access here. McKinney's Practice Commentaries (attached to the e-mail enclosing this letter) confirms this. It explains:

The extremely broad investigative power conferred upon the Attorney General by the Martin Act is evidenced by the fact that the statute affords him not one but two means of pursuing his investigative goals: confidential investigations conducted under compulsion of subpoena (§ 352) and public investigations conducted pursuant to court order (§§ 354 and 355). . . .

Again, an important aspect of the use of Section 354 orders is the fact that inasmuch as they are public documents filed in court, the media are entitled to know of the issuance of the order, its provisions and the basis for its being issued (which is usually set forth in the affidavit of the Assistant Attorney General seeking the order). **The examination itself, as noted, may also be a public event. It can take place in a courtroom to which the press is entitled to access.**

Thus, unlike the process initiated by the service of a Section 352 subpoena, the service of a Section 354 order is not a confidential matter, nor is the investigation itself treated confidentially. Orestes J. Mihaly

& David J. Kaufmann, *Securities Commodities and Other Investments*, in McKinney's Cons. Laws of NY, Book 19, General Business Law Art 23-A, 361-62 (2012) (emphasis added).¹

Consistent with these Commentaries, our Office received an unsolicited request last week from a Rochester-based media member for information about whether the examinations can be seen publicly.

Second, Black's Law Dictionary confirms that these examinations are "sittings" of the Court which must be open to the public under Judiciary Law § 4. See *Matter of O'Connell's Est.*, 394 N.Y.S.2d 816, 817-18 (Sur. Ct. 1977) (relying on Black's Law Dictionary for the meaning of "sitting" for purposes of Section 4 of the Judiciary Law). Black's defines "sitting" as a "court session" and to "sit" as "to hold court or perform official functions." Black's Law Dictionary (11th ed. 2019). Plainly, examinations which will be supervised in their entirety by a Court-appointed Referee are "court sessions" in which the Court is performing official function and thus Court "sittings."

Third, Respondents failed to identify any basis in their own September 9, 2021 letter or during the September 13, 2021 conference to justify closure of the examinations. Respondents identify no sensitive business or personal information that would be exposed during the examinations. We believe there is none.

This is an insider trading and false disclosure case, not a trade secrets case or a case involving personal matters. We expect the substance of the examinations will generally track the facts laid out in our publicly filed Section 354 application. These facts do not implicate the type of sensitive information that would justify closure and Respondents have not sought judicial relief to limit public access to them. Removing the examinations from public view, notwithstanding the strong presumption in favor of public access set forth in the Judiciary Law and as described in the Martin Act Practice Commentaries above, is a wholly disproportionate solution to the entirely hypothetical and unsubstantiated claims here.

To the extent there are any issues, Respondents should identify them in advance of the examinations so that the parties can meet and confer to address them. We also understand that Microsoft Teams, through which the examinations will be conducted, provides functionality that would enable the parties and the Special Referee to move to a private, break-out room to discuss any issues concerning possible sensitive matters that arise.

Finally, Respondents' newly identified authority does not support its claim that the examinations should be held privately. The authority is either irrelevant or supports public examinations.

- The first set of authority cited by Respondents simply addresses the court's uncontroversial authority to appoint a referee to supervise ordinary pre-trial depositions. It does not address whether these depositions must be held publicly to the extent a referee is involved. And it says nothing about Court-ordered and supervised Section 354 examinations. See *Slapo v. Winthrop Univ. Hosp., et al.*, 130 N.Y.S.3d 478, 481-82 (2d Dep't 2020) *K.S., et al. v. City of New York, et al.*, 867 N.Y.S.2d 516, 517 (2d Dep't 2008); *Laddcap Value Partners, LP v. Lowenstein Sandler P.C.*, 2017 WL 4901555, at *4-6 (Sup. Ct. Dec. 5, 2007).

¹ Further, the Oxford English Dictionary defines public as "1. a. Open to general observation, view, or knowledge; existing, performed, or carried out without concealment, so that all may see or Hear..." Black's Law Dictionary defines "public" as "**public** *adj.* (14c) **1.** Of, relating to, or involving an entire community, state, or country. **2.** Open or available for all to use, share, or enjoy..."

- The second set of authority merely holds that the location of a proceeding in the courthouse is not by itself dispositive of whether the proceeding is public. *James v. Powell*, 273 N.Y.S.2d 730, 731-33 (Sup. Ct. Oct. 4, 1966); *Estate of Lehner*, 665 N.Y.S.2d 835, 837 (Sur. Ct. Oct. 31, 1997). It actually supports the conclusion that 354 examinations are judicial sittings which must be made public. For example, in *James v. Powell*, the court concluded that the pre-trial deposition at issue there was not a “sitting” of the court because “the entire proceeding, from the issuance of the subpoena [by counsel] to the signing of the deposition may be had outside of the courthouse and without any supervision by the court.” *James*, 273 N.Y.S.2d at 732. In contrast, the 354 examinations at issue here require court involvement from beginning to end as the examinations must be Court ordered and judicially-supervised. In addition, unlike *Estate v. Lehner*, the examinations here are not analogous to depositions under the CPLR. The CPLR does not apply to them; they are Court-supervised; the transcripts must be publicly filed; and the examinations are a tool of law enforcement because only the Attorney General can seek an examination pursuant to Section 354. GBL § 354.
- Respondents conclude by citing a federal criminal case. There, the Second Circuit concluded that it was error for a district court to hold federal criminal proceedings in the court’s robing room. *United States v. Alcantara*, 396 F.3d 189, 201-04 (2d Cir. 2005). To the extent the case has any relevance here, it supports maintaining public access to the examinations. It affirms that it is the court’s responsibility to maintain open access to its proceedings. *Id.* at 199 (holding that the court must make specific findings before closing a proceeding). And it makes clear that release of a transcript after a proceeding does not satisfy the public’s right of access. *Id.* at 201 (holding that “fact that transcripts . . . were later available to the public and press does not satisfy the First Amendment right of access.”).

We thank the Court for its attention to this matter.

Respectfully submitted,

/s/ Jeffrey A. Novack
Jeffrey A. Novack

CC: All Counsel (via e-mail)

Elizabeth Shamahs

From: Levy, Michael <mlevy@sidley.com>
Sent: Tuesday, September 21, 2021 11:51 AM
To: Elizabeth Shamahs
Cc: Gable, Melissa; Goldstein, Katherine; Asaro, Michael; Thrasher, Cristina; Chin, Kristen; Cohen, Stephen L.; Bello, Paul J.; johnnowak@paulhastings.com; Solomon, Katherine K.; Novack, Jeffrey; Lindemuth, Stephanie; Sorkin, Joseph L.; Sean Hecker; Shawn G. Crowley
Subject: RE: James v. Kodak & Continenza, Index No. 451652/2021 - Citations from Conference

Special Referee Shamahs,

We write respectfully to seek leave to offer this brief response to a single, previously unraised argument in the Attorney General's latest filing. Specifically, the Attorney General relies for the first time on several sentences from a section of McKinney's Practice Commentary in which two private lawyers writing in 1995—one an assistant general counsel at Merrill Lynch and the other a partner at Kaufmann, Feiner, Yamin, Gildin & Robbins—offered their unexplained opinion that examinations under Section 354 of the Martin Act “may” be conducted publicly. It is noteworthy that this belated citation is literally the only source the Attorney General has ever identified that says Section 354 examinations may be conducted publicly. But the source is of no value because the Practice Commentary's authors cite nothing to support or justify their opinion. Nor could they. Section 354 itself does not say the examinations should be conducted publicly; only that the transcript should be filed publicly after the fact. No judicial decision has ever said that examinations under Section 354 should be conducted publicly. And the Attorney General has effectively acknowledged that its own standard practice for decades has been to conduct Section 354 examinations in the distinctly non-public setting of its law offices. Practice Commentary is never binding, but where the conclusion of its authors is offered without any support or explanation, and runs contrary to all available authorities, it is of no moment at all. *See, e.g., People v. Danton*, 895 N.Y.S.2d 669, 677 (Sup. Ct., N.Y. Co. 2010) (rejecting state's reliance on practice commentary, explaining, “The Practice Commentary offers no support or explanation for [its] construction[.] . . . In light of the numerous reasons for reaching the opposite conclusion, and the dearth of reasoning supporting it, this court declines to adopt the interpretation of the Practice Commentary.”); *Tzolis, et al. v. Wolff, et al.*, 39 A.D.3d 138, 142 (1st Dep't 2007) (declining to follow prior ruling from Second Department where that court's decision had “[a]pparently rel[ied] solely on McKinney's Practice Commentaries”); *People v. Wright*, 332 N.Y.S.2d 231, 232 (Sup. Ct., N.Y. Co. 1972) (rejecting defendant's reliance on a statement “contained in the practice commentary under this section of McKinney's Consolidated Laws” where “[t]he commentator's authority to support th[e] statement does not appear,” and the statement “seems to be inconsistent with the provisions of the statute”).

As noted above, we seek leave only to submit this short email addressing this one new authority offered for the first time in the Attorney General's latest letter, but we are, of course, available to discuss or submit a letter on any of the other issues addressed therein if it would assist in your decision.

Respectfully submitted,

MICHAEL A. LEVY

SIDLEY AUSTIN LLP
+1 212 839 7341
mlevy@sidley.com

From: Novack, Jeffrey <Jeffrey.Novack@ag.ny.gov>
Sent: Monday, September 20, 2021 4:22 PM

To: Elizabeth Shamahs <eshamahs@nycourts.gov>; Levy, Michael <mlevy@sidley.com>
Cc: Gable, Melissa <Melissa.Gable@ag.ny.gov>; Goldstein, Katherine <kgoldstein@akingump.com>; Asaro, Michael <masaro@akingump.com>; Thrasher, Cristina <cthrasher@akingump.com>; Chin, Kristen <Kristen.Chin@akingump.com>; Cohen, Stephen L. <scohen@sidley.com>; Bello, Paul J. <pbello@sidley.com>; johnnowak@paulhastings.com; Solomon, Katherine K. <katherinesolomon@paulhastings.com>; Lindemuth, Stephanie <slindemuth@akingump.com>; Sorkin, Joseph L. <jsorkin@AkinGump.com>; Sean Hecker <shecker@kaplanhecker.com>; Shawn G. Crowley <scrowley@kaplanhecker.com>
Subject: RE: James v. Kodak & Continenza, Index No. 451652/2021 - Citations from Conference

Dear Special Referee Shamahs:

Please see the attached letter in response. We also enclose one of the authorities cited in the letter.

Thank you.

Respectfully submitted,

Jeffrey A. Novack

Jeffrey A. Novack | Assistant Attorney General
New York State Office of the Attorney General
Investor Protection Bureau
28 Liberty St., New York, NY 10005
Tel: 212-416-6178 | jeffrey.novack@ag.ny.gov

From: Elizabeth Shamahs <eshamahs@nycourts.gov>
Sent: Wednesday, September 15, 2021 9:59 AM
To: Levy, Michael <mlevy@sidley.com>
Cc: Gable, Melissa <Melissa.Gable@ag.ny.gov>; Novack, Jeffrey <Jeffrey.Novack@ag.ny.gov>; Goldstein, Katherine <kgoldstein@akingump.com>; Asaro, Michael <masaro@akingump.com>; Thrasher, Cristina <cthrasher@akingump.com>; Chin, Kristen <Kristen.Chin@akingump.com>; Cohen, Stephen L. <scohen@sidley.com>; Bello, Paul J. <pbello@sidley.com>; johnnowak@paulhastings.com; Solomon, Katherine K. <katherinesolomon@paulhastings.com>; Lindemuth, Stephanie <slindemuth@akingump.com>; Sorkin, Joseph L. <jsorkin@AkinGump.com>; Sean Hecker <shecker@kaplanhecker.com>; Shawn G. Crowley <scrowley@kaplanhecker.com>
Subject: RE: James v. Kodak & Continenza, Index No. 451652/2021 - Citations from Conference

[EXTERNAL]

Thank you, Mr. Levy.

Mr. Novack, if you would like to respond, please do on or before 5:00 P.M. on September 20, 2021.

Elizabeth Shamahs
Special Referee

From: Levy, Michael <mlevy@sidley.com>
Sent: Tuesday, September 14, 2021 9:22 PM
To: Elizabeth Shamahs <eshamahs@nycourts.gov>
Cc: Melissa.Gable@ag.ny.gov; Novack, Jeffrey <Jeffrey.Novack@ag.ny.gov>; Goldstein, Katherine <kgoldstein@akingump.com>; Asaro, Michael <masaro@akingump.com>; Thrasher, Cristina <cthrasher@akingump.com>; Chin, Kristen <Kristen.Chin@akingump.com>; Cohen, Stephen L.

<scohen@sidley.com>; Bello, Paul J. <pbello@sidley.com>; johnnowak@paulhastings.com; Solomon, Katherine K. <katherinesolomon@paulhastings.com>; Lindemuth, Stephanie <slindemuth@akingump.com>; Sorkin, Joseph L. <jsorkin@AkinGump.com>; Sean Hecker <shecker@kaplanhecker.com>; Shawn G. Crowley <scrowley@kaplanhecker.com>

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Best,

Mike Levy

MICHAEL A. LEVY

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Elizabeth Shamahs

From: Novack, Jeffrey <Jeffrey.Novack@ag.ny.gov>
Sent: Wednesday, September 22, 2021 1:16 PM
To: Levy, Michael; Elizabeth Shamahs
Cc: Gable, Melissa; Goldstein, Katherine; Asaro, Michael; Thrasher, Cristina; Chin, Kristen; Cohen, Stephen L.; Bello, Paul J.; johnnowak@paulhastings.com; Solomon, Katherine K.; Lindemuth, Stephanie; Sorkin, Joseph L.; Sean Hecker; Shawn G. Crowley
Subject: RE: James v. Kodak & Continenza, Index No. 451652/2021 - Citations from Conference

Dear Special Referee Shamahs:

We write to offer this brief response to Respondents' September 21, 2021 e-mail.

First, the Practice Commentaries cited in our prior submission are not a new "previously unraised argument." Rather, they provide additional support for what we have maintained from the outset: that 354 proceedings must be open to the public. *See, e.g., Matter of Abrams*, 160 Misc. 2d 824, 611 N.Y.S.2d 422 (Sup. Ct. 1994) (describing a 354 examination as a "public examination").

Second, the Practice Commentaries are entirely consistent with the case law, which recognizes the public nature of 354 proceedings, and Judiciary Law Section 4, which mandates that court proceedings be open to the public. Courts routinely rely on Practice Commentaries like the one cited in our submission. *See, e.g., People v. Schneider*, 37 N.Y.3d 187 (2021); *Feiger v. Ray Enterprises, LLC*, 195 A.D.3d 443, 443 (1st Dep't 2021).

Third, each of the three cases cited by Respondents in their September 21, 2021 e-mail involve unique situations in which the court rejected the Commentaries in the face of mandatory contrary authority. No such authority is present here.

Finally, yesterday our office received an additional unsolicited inquiry requesting information on whether Mr. Byrd's testimony would be available via livestream.

We thank the Court for its attention to this matter.

Respectfully submitted,

Jeffrey A. Novack

Jeffrey A. Novack | Assistant Attorney General
New York State Office of the Attorney General
Investor Protection Bureau
28 Liberty St., New York, NY 10005
Tel: 212-416-6178 | jeffrey.novack@ag.ny.gov

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Sent: Tuesday, September 21, 2021 11:51 AM
To: Elizabeth Shamahs <eshamahs@nycourts.gov>
Cc: Gable, Melissa <Melissa.Gable@ag.ny.gov>; Goldstein, Katherine <kgoldstein@akingump.com>; Asaro, Michael <masaro@akingump.com>; Thrasher, Cristina <cthramer@akingump.com>; Chin, Kristen <Kristen.Chin@akingump.com>; Cohen, Stephen L. <scohen@sidley.com>; Bello, Paul J. <pbello@sidley.com>; johnnowak@paulhastings.com; Solomon, Katherine K. <katherinesolomon@paulhastings.com>; Novack, Jeffrey

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Respectfully submitted,

MICHAEL A. LEVY

SIDLEY AUSTIN LLP

+1 212 839 7341

mlevy@sidley.com

From: Novack, Jeffrey <Jeffrey.Novack@ag.ny.gov>

Sent: Monday, September 20, 2021 4:22 PM

To: Elizabeth Shamahs <eshamahs@nycourts.gov>; Levy, Michael <mlevy@sidley.com>

Cc: Gable, Melissa <Melissa.Gable@ag.ny.gov>; Goldstein, Katherine <kgoldstein@akingump.com>; Asaro, Michael <masaro@akingump.com>; Thrasher, Cristina <cthrasher@akingump.com>; Chin, Kristen <Kristen.Chin@akingump.com>; Cohen, Stephen L. <scohen@sidley.com>; Bello, Paul J. <pbello@sidley.com>; johnnowak@paulhastings.com; Solomon, Katherine K. <katherinesolomon@paulhastings.com>; Lindemuth, Stephanie <slindemuth@akingump.com>; Sorkin, Joseph L. <jsorkin@AkinGump.com>; Sean Hecker

<shecker@kaplanhecker.com>; Shawn G. Crowley <scrowley@kaplanhecker.com>

Subject: RE: James v. Kodak & Continenza, Index No. 451652/2021 - Citations from Conference

Dear Special Referee Shamahs:

Please see the attached letter in response. We also enclose one of the authorities cited in the letter.

Thank you.

Respectfully submitted,

Jeffrey A. Novack

Jeffrey A. Novack | Assistant Attorney General

New York State Office of the Attorney General

Investor Protection Bureau

28 Liberty St., New York, NY 10005

Tel: 212-416-6178 | jeffrey.novack@ag.ny.gov

From: Elizabeth Shamahs <eshamahs@nycourts.gov>

Sent: Wednesday, September 15, 2021 9:59 AM

To: Levy, Michael <mlevy@sidley.com>

Cc: Gable, Melissa <Melissa.Gable@ag.ny.gov>; Novack, Jeffrey <Jeffrey.Novack@ag.ny.gov>; Goldstein,

Katherine <kgoldstein@akingump.com>; Asaro, Michael <masaro@akingump.com>; Thrasher, Cristina

<cthrasher@akingump.com>; Chin, Kristen <Kristen.Chin@akingump.com>; Cohen, Stephen L.

<scohen@sidley.com>; Bello, Paul J. <pbello@sidley.com>; johnnowak@paulhastings.com; Solomon, Katherine

K. <katherinesolomon@paulhastings.com>; Lindemuth, Stephanie <slindemuth@akingump.com>; Sorkin,

Joseph L. <jsorkin@AkinGump.com>; Sean Hecker <shecker@kaplanhecker.com>; Shawn G. Crowley

<scrowley@kaplanhecker.com>

Subject: RE: James v. Kodak & Continenza, Index No. 451652/2021 - Citations from Conference

[EXTERNAL]

Thank you, Mr. Levy.

Mr. Novack, if you would like to respond, please do on or before 5:00 P.M. on September 20, 2021.

Elizabeth Shamahs

Special Referee

From: Levy, Michael <mlevy@sidley.com>

Sent: Tuesday, September 14, 2021 9:22 PM

To: Elizabeth Shamahs <eshamahs@nycourts.gov>

Cc: Melissa.Gable@ag.ny.gov; Novack, Jeffrey <Jeffrey.Novack@ag.ny.gov>; Goldstein, Katherine

<kgoldstein@akingump.com>; Asaro, Michael <masaro@akingump.com>; Thrasher, Cristina

<cthrasher@akingump.com>; Chin, Kristen <Kristen.Chin@akingump.com>; Cohen, Stephen L.

<scohen@sidley.com>; Bello, Paul J. <pbello@sidley.com>; johnnowak@paulhastings.com; Solomon, Katherine

K. <katherinesolomon@paulhastings.com>; Lindemuth, Stephanie <slindemuth@akingump.com>; Sorkin,

Joseph L. <jsorkin@AkinGump.com>; Sean Hecker <shecker@kaplanhecker.com>; Shawn G. Crowley

<scrowley@kaplanhecker.com>

Subject: James v. Kodak & Continenza, Index No. 451652/2021 - Citations from Conference

Special Referee Shamahs,

During yesterday's conference, I made reference to various relevant judicial decisions that we had been able to identify in the hours since the Attorney General's submission of its letter earlier in the day. Because the parties had an opportunity to discuss the disputed issue with you fully at the conference, the Kodak parties do not seek leave to submit a reply to the Attorney General's submission. But for your convenience, attached please find citations to the decisions on three subjects.

First, cases demonstrating that, contrary to the Attorney General's assertions, judicial appointment of a special referee to supervise a pretrial examination like the one here does not turn that examination into a public event, because special referees are regularly appointed by judges to oversee non-public pretrial examinations like depositions. *See, e.g., Slapo v. Winthrop Univ. Hosp., et al.*, 130 N.Y.S.3d 478, 480 (App. Div. Sept. 2, 2020) (affirming appointment of special referee to supervise deposition); *K.S., et al. v. City of New York, et al.*, 867 N.Y.S.2d 516, 517 (App. Div. Nov. 12, 2008) (remitting with instruction to appoint referee to supervise deposition); *Laddcap Value Partners, LP v. Lowenstein Sandler P.C.*, 2017 WL 4901555, at *7 (Sup. Ct. Dec. 5, 2007) (appointing referee to supervise further depositions at the courthouse).

Second, cases demonstrating, contrary to the Attorney General's assertion, that an examination does not become a publicly accessible sitting of the court simply because it is scheduled to be conducted inside of a courthouse. *See James v. Powell*, 273 N.Y.S.2d 730, 732-33 (Sup. Ct. Oct. 4, 1966) (where examination of judgment creditor could have been conducted in "a law office or in some other non-court location," fact that it was to be "physically held at the courthouse" did not turn the proceeding into a public "sitting of the court"); *Estate of Lehner*, 665 N.Y.S.2d 835, 837 (Sur. Ct. Oct. 31, 1997) (holding that examination in probate proceeding, even though frequently "held at the courthouse," was not a publicly accessible sitting of the court because it was in the nature of a deposition or an examination before trial); *see also Laddcap Value Partners*, 2017 WL 4901555, at *7 (directing that, due to attorney's misbehavior, all "further depositions" in civil case would be supervised by special referee "at the courthouse").

Finally, in response to the Attorney General's unusual contention that there is no inconsistency between its current position that Martin Act examinations must be conducted publicly and its longstanding practice of conducting such examinations in the private setting of its offices, a leading case from the Second Circuit demonstrating that *if* Martin Act examinations actually *were* intended to be open to the public (which they are not), the Attorney General's regular practice of conducting them instead at its offices to which the public has no expectation of ready access would mean the Attorney General has over the years been repeatedly violating the law. *See United States v. Alcantara*, 396 F.3d 189, 202 (2d Cir. 2005) (rejecting government's contention that proceeding conducted in judge's robing room had been open "to the public," because "[m]embers of the public understand that they are free to enter a courtroom" but "[m]ost would not view a judge's robing room as a space to which they have a right of access" and "[i]t seems quite unlikely that a spectator in the courtroom would have felt at liberty to follow the parties into the robing room").

Best,

Mike Levy

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