

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: HON. RICHARD B. LOWE, III  
*Justice*

PART 56m

Herbert Altman et al

INDEX NO. 604220/06

MOTION DATE 2/9/07

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

- v -

The New York Board

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE

WITH ACCOMPANYING MEMORANDUM DECISION

**FILED**  
APR 06 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/27/07

HON. RICHARD B. LOWE, III  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X

HERBERT ALTMAN, RONALD BERNSTEIN,  
CHRISTOPHER C. CADY, JEFFREY CHASON,  
JENNIFER M. COLLI, SALVATORE COLLI, CARMINE  
CUMBO, JEFFREY DAVIS, ERIC DINOWITZ, KEVIN  
P. DRONER, WALTER FAIR, ROBERT FERRARO,  
RICHARD FISCHER, MARC FISHBERGER,  
JOHN B. FORSYTH, LON FREDERICKS, DOUGLAS  
M. FRIEDMAN, ARNOLD FUCHS, FOGERG GILLIES,  
HAROLD GREEN, RICHARD C. K. HALES, EILEEN  
C. HALLIGAN, JOSEPH J. HAYDUK, MICHAEL  
JACOBSON, MICHAEL KAREN, MAX KATZ,  
SEAN KEATING, DAVID LONDONER, JOHN  
McNAMARA, C. ADAM MEDICI, MATTHEW MESSINA,  
MICHAEL A. MILEVOI, JAMES MURPHY,  
JESSICA PEARSON, PABLO PORTUGAL,  
DOMINICK A. RIBELO, DANIEL REYNOLDS,  
MICHAEL ROMANO, ROBERT ROSSI,  
DONALD SAARI, TIMOTHY SHAW, EUGENE  
STEFANELLI, JUDE SULLIVAN, JULIAN TAYLOR,  
STEPHEN C. TUCK, MICHAEL WAGNER, JAY C.  
WALSH and JOHN M. WALSH,

Index No. 604220/06

Plaintiffs,

-against-

THE NEW YORK BOARD OF TRADE AND THE BOARD  
OF GOVERNORS OF THE NEW YORK BOARD OF TRADE,

Defendants.

-----X

**Hon. Richard B. Lowe, III:**

Plaintiffs move pursuant to CPLR Article 62 for a preliminary injunction. Defendants  
New York Board of Trade (NYBOT) and the Board of Governors of the New York Board of  
Trade move pursuant to CPLR 3211(a)(1),(5), & (7) for an order dismissing the complaint.

**FILED**  
APR 06 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

## Background

NYBOT is a not-for-profit corporation organized under the New York Not-for-Profit Corporation Law ("NPCL"). NYBOT is the fourth largest U.S. commodity exchange. It provides a physical marketplace for the trading of commodity futures contracts and options thereon for agricultural commodities (such as sugar, coffee and cotton), foreign currencies, and certain equity and commodity indices.

NYBOT was formed in 1997 in anticipation of a merger the following year of the Coffee Exchange and the New York Cotton Exchange. The merger began in 1998 and the final phase of said merger occurred in June 2004, in which NYBOT officially succeeded to the designations of the Cotton Exchange and the Coffee Exchange as contract markets. It was approved by the Commodity Futures Trading Commission (CFTC), the federal regulatory agency with primary responsibility for the U.S. commodity markets. In 2004, NYBOT's By-Laws and Membership Rules ("Rules") were submitted to the CFTC in 2004 as part of the review process and promulgated at this time.

The plaintiffs are known within NYBOT as Permit Holders.<sup>1</sup> A Permit Holder holds a Trading Permit issued by NYBOT that allows him/her to trade specific futures contracts and/or options traded on NYBOT. They may only trade those specifically designated futures contracts and options that are traded on NYBOT and nothing else. Prior to 2004, when the By-Laws were issued, the Permit Holders were commonly referred to as Associate Members.

The plaintiffs, as Permit Holders, are distinguishable from other members of NYBOT known as Equity Members. These members own Equity Memberships which are similar to what

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<sup>1</sup> Plaintiffs in this action represent 53 of approximately 700 Permit Holders.

are traditionally seats on an exchange. It is undisputed that Equity Members have the right to trade all futures contracts and options traded on NYBOT. It is also undisputed that the Equity Members have the right to vote on all matters concerning NYBOT's governance and future business structure (such as mergers and acquisitions) and to share in distributions related to any corporate transactions.

This instant matter arises out of a proposed merger between NYBOT and the InterContinental Exchange (ICE). Under the merger terms, NYBOT would become a wholly owned for-profit subsidiary of ICE organized under Delaware Law. The merger deal was announced on September 14, 2006. The next day a meeting was held with NYBOT's Equity Members to discuss the terms of the merger with them. A summary statement prepared by NYBOT's financial advisor in connection with the meeting was filed with the Securities and Exchange Commission (SEC) (*Supplemental Hirshfeld Aff. Exhibit S*).

The terms of the ICE Merger also were discussed with the NYBOT Permit Holders. NYBOT senior management met with various Permit Holder groups on October 3 and October 6, 2006. Informational statements regarding the ICE Merger tailored to Permit Holders were filed with the SEC on September 27, 2006 (*Supplemental Hirshfeld Aff., Exhibits T and U*). The informational statements state that the Permit Holders would continue to receive trading privileges equivalent to those enjoyed at NYBOT.

This instant action was filed on December 8, 2006 after counsel for plaintiffs met with defendants' counsel on November 28, 2006 and plaintiffs expressed their concern with the merger. The plaintiffs allege that no portion of the \$1.2 billion in cash and stock payable to NYBOT will be distributed to the Permit Holders. They also allege they were deprived of their

right to vote on the proposed merger. Further it is alleged they will lose significant existing rights and protections which will jeopardize their ability to continue to operate and maintain viable floor operations and the value of their permits will be diminished. Plaintiffs characterize the merger as an attempt by the defendants to “strip” them of membership and all of Plaintiffs’ trading and floor operation rights may be eliminated and transferred by Defendants in the ICE agreement in an attempt to deprive plaintiffs of their membership rights (Complaint ¶ 8).

Despite the complaint being filed on December 8, 2006, plaintiffs did not seek injunctive relief. A merger vote by NYBOT’s Equity Members was held on December 11, 2006. 93% of NYBOT Equity Members approved the merger. The same day, NYBOT and ICE issued parallel press releases announcing the approval and indicating their plan to close the ICE Merger in early 2007 (*Supplemental Hirshfeld Aff.*, Exhibit W).

On January 3, 2007, NYBOT filed its motion to dismiss the Complaint. The next day, NYBOT and ICE issued parallel press releases indicating they anticipated the ICE Merger would close in mid-January 2007.

As part of its preparation for the closing, NYBOT circulated to its Permit Holders a form of Permit Holder Agreement, intended to confirm the existence of trading privileges on the new exchange to be operated by NYBOT’s successor. NYBOT argues the agreement mirrors the trading privileges that the Permit Holders enjoyed at NYBOT (*Supplemental Hirshfeld Aff.*, Exhibit Y).

On the January 10, 2007, plaintiffs presented an order to show cause containing a temporary restraining order (TRO) and seeking a preliminary injunction, seeking to enjoin the closing of the ICE merger which was now scheduled to occur on January 12, 2007. The court

denied the request for a TRO<sup>2</sup> and now turns to the motion for a preliminary injunction along with defendants' motion to dismiss.

At the heart of the issues between the parties is a determination of the Permit Holders rights under the NYBOT by-Laws and rules. Plaintiffs allege their rights were deprived by the defendants whereby they shared in no part of the approximate \$1.2 billion distributed as part of the merger. They also allege their rights to vote on the proposed merger were deprived.

Plaintiffs have alleged fourteen causes of action. Six of these causes of action are for declaratory relief determining the contours of their rights as Permit Holders. They believe they were entitled to participate in the decision making process as well as share in the proceeds of the merger. Further, Plaintiffs seek declarations that NYBOT has wrongfully sold, diminished, and terminated their rights. The other sought after declarations would also find the transfer itself invalid and that there was a breach of fiduciary duty by NYBOT's board.

Defendants, on the other hand, argue plaintiffs' seek to be recognized as *de facto* Equity Members even though the rules clearly state that they are not entitled to those same benefits. They argue the by-Laws and rules clearly define the limited privileges conferred by a Trading Permit and make clear that the Permit Holders have none of the rights of Equity Members. Under the by-laws and rules, the Equity Members have the right to trade all futures contracts and options traded on NYBOT; they have sole voting rights and they have the sole right to receive any distributions from NYBOT, including in the event of a merger.

The court will first turn to the defendants' motion to dismiss the complaint.

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<sup>2</sup> The parties did sign a stipulation dated January 11, 2007 whereby the plaintiffs agreed to execute the new Permit Holder Agreements, however the parties agreed this would not constitute a waiver or release of any matters alleged in the complaint filed in this action.

## Discussion

On a motion to dismiss pursuant to CPLR 3211(a)(7), a plaintiff is entitled to all favorable inferences that may reasonably be drawn from the complaint. However a complaint may be dismissed where the pleadings are flatly contradicted by documentary evidence (*Lovisa Construction Co., Inc. v Metropolitan Transportation Authority*, 198 AD2d 333, 333 [2nd Dept 1993]). A motion to dismiss based on CPLR 3211(a)(1) should be granted if the documentary evidence resolves all factual issues as a matter of law and conclusively disposes of the plaintiffs' claims (*Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 495 [1st Dept 2006]).

### First, Second, and Third Causes of Action

The Plaintiffs seek declarations that they are "members" of NYBOT within the meaning of the NPCL and therefore the ICE Merger could not have proceeded without their receiving notice of the vote, participation in the vote and their approval.

NPCL § 102(a)(9) defines "members" as those persons "having rights in a corporation in accordance with the provisions of its certificate of incorporation or by-laws." When the Permit Holder fills out an application for membership, he/she agrees to "be bound by and [to] comply with all the provisions of the certificate of incorporation, by-laws, rules, resolutions, orders, decisions, awards, requirements and procedures of the Exchange as now in effect, hereafter adopted or hereafter amended" (*Hirschfeld Aff. Exhibit E*).

Therefore, this court must turn to NYBOT's by-laws and rules in order to determine the scope of plaintiffs membership. § 101(b) of NYBOT's by-laws states:

Permit Holders . . . shall have all of the obligations of Equity Members except as provided by the Board but shall **not** constitute Equity Members within the meaning of the Rules, shall **not** have

any of the rights and privileges of Equity Membership and shall have only such rights and privileges as are set forth in the Rules or as prescribed by the Board, which rights will exist as a matter of contract only. Permit Holders . . . shall **not** constitute “members” within the meaning of the NPCL and shall **not** have any of the rights or privileges of “members” under the NPCL. Without limiting the generality of the foregoing, Permit Holders . . . will **not have any voting rights** in the Exchange **or any rights to receive any distributions** of cash, securities or other property, whether on dissolution, liquidation, **merger**, consolidation or otherwise. (Emphasis Added).

NYBOT Rule 2.38 state that Permit Holders “shall not represent by word or conduct that he is an Equity Member of the Exchange” (*Hirschfeld Affidavit, Exhibit C*).

The by-laws and rules clearly except Permit Holders from the rights and privileges of Equity Members, including voting rights. Specifically, it states that unlike the Equity Members, the Permit Holders are *not* members as defined by the NPCL. Therefore, the plaintiffs were not entitled to participate in the decision to proceed with the ICE merger. The by-laws clearly state that Permit Holders do not have the same rights as Equity Members and are not “members”.

Despite the clear and unequivocal language of the by-laws, the plaintiffs still attempt to argue that NPCL §903(a) applies. This provision mandates that notice of a vote, with respect to a plan or merger of the entity, must be given to all members of a not for profit corporation in order for the vote to be valid. The provision also requires the plan or merger to be approved by two-thirds of the members (*NPCL § 903(a)(2)*). However, the plaintiffs fail to acknowledge NPCL §102(a)(9) which allows the corporation’s by-laws to determine who are “members” for purposes of voting rights.

The language of the by-laws and NYBOT rules are plain and unmistakable. Plaintiffs are not “members” for purposes of NPCL§ 903. They have no voting rights in NYBOT and no right

to share in the proceeds of the merger. Therefore, the causes of action declaring Permit Holders to have all the rights of Equity Members, pursuant to this statute, must fail.

Fourth, Fifth, and Twelfth Causes of Action

In the Fourth and Fifth causes of action, plaintiffs seek declarations that the ICE merger involves a breach of fiduciary duty and fiduciary self-dealing by NYBOT's Board of Governors and is therefore void under the NPCL. In the Twelfth Cause of Action, Plaintiffs seek damages for breach of fiduciary duty.

The defendants seek to dismiss these causes of action because the Permit Holders are not "members" of NYBOT within the meaning of NPCL. Therefore, they argue they are not owed a fiduciary duty under the NPCL and plaintiffs cannot assert a breach of fiduciary duty or self dealing in violation of fiduciary obligations by the NYBOT Board of Governors.

This court has already determined the Permit Holders are not "members" for purposes of the NPCL and therefore, a cause of action for breach of fiduciary duty based on this argument necessarily fails.

The plaintiffs plead that the board of a not-for-profit corporation owes a fiduciary duty to the "constituents" of that corporation (*Complaint* ¶ 12). In support of their motion to dismiss, the defendants argue that a board's fiduciary duty cannot extend to every constituent of a corporation. In opposition, plaintiffs do not address the argument that should the court find them to not be members for purposes of the NPCL, the board does not have a fiduciary duty towards them as mere constituents.

NYBOT's Permit Holders are not members or shareholders of NYBOT and therefore the board cannot owe them a fiduciary duty.

Therefore, the fourth, fifth, and twelfth causes of action are dismissed.

*Eighth, Ninth, Tenth, and Eleventh Causes of Action*

Plaintiffs' Eighth through Eleventh Causes of Action sound in breach of contract.

Curiously, the plaintiffs fail to allege within the complaint the contract which they believe has been violated. The complaint does not identify the contract nor does it identify the contract terms that have been violated. The plaintiffs only plead that their unspecified contract rights have been violated (*Complaint* ¶ 11). There is no single reference to a document which plaintiff alleges confer these purported rights upon it.

Furthermore, the purported rights which the court assumes the plaintiff alleges as a breach of contract have already been determined to be non-existent. The terms of the trading permits, as set forth in NYBOT's rules and the limitations on the privileges accorded to the Permit Holders do not provide them with any equity rights, voting rights or rights to participate in the proceeds of a merger. To the contrary, assuming the plaintiff intended to plead the contract terms contained within the by-laws and NYBOT rules, those documents specifically negate the purported rights.

In opposition, the plaintiffs plead a "course of conduct" which confer the specific contractual rights upon it. The Plaintiffs also attempt to argue that the parties course of conduct over the years should persuade this court to ignore the clear and unambiguous by-laws and rules, to look beyond their language and intent, thereby finding the Permit Holders entitled to voting rights as well as a share of proceeds. The court notes this purported "course of conduct" is not found within the complaint. However, even if the plaintiffs were to amend their complaint the cause of action would fail.

The existence and terms of a contractual relationship between the parties can be established from their course of conduct (*Ahern v South Buffalo Ry. Co.*, 303 NY 545, 561 [1952]). However, even though the pleaded facts are presumed true and accorded the most favorable inference, allegations consisting of bare legal conclusions which are flatly contradicted by documentary evidence will not be given such consideration” (*Abromovitz v Paragon Sporting Goods Co., Inc.*, 202 AD2d 206 [1st Dept 1994]).

Plaintiffs plead in their complaint and emphasize in their supporting brief the many rights they were afforded which were consistent with those rights enjoyed by an Equity Member.

Indeed, the defendants do not seem to dispute that

Permit Holder Members possessed membership rights in their defined rings and contracts including the right to trade the futures and/or options contracts corresponding to their Permit/Membership on the floor of the NYBOT exchange. (*Complaint* ¶ 25).

Permit Holders were and are subject to all member rules, disciplinary proceedings and sanctions (*Id.* ¶ 26).

Permit Holders have participated on governing committees within NYBOT (*Katz Aff* ¶ 2).

Some of the items referenced in Plaintiffs’ counsel’s affirmation as constituting course of conduct also include — having Plaintiffs’ names listed in NYBOT’s floor directory; favorable fee rates for some, but not all of the Plaintiffs; the ability to access NYBOT’s computer room to input required trade information to submit trades for clearance; and the availability of life insurance (*Bernfeld Opp. Aff. at* ¶ 5)<sup>3</sup>. However, while the Permit Holders may have enjoyed

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<sup>3</sup> The court notes these allegations have been asserted through the affirmation of counsel, who is not an individual with first hand knowledge of the information. Furthermore, the defendant contests the accuracy of the information (*See Hines Affidavit*).

some of the rights and privileges held by the Equity Members, the one which they did not allegedly exercise was that of voting for any plan or merger or participating in the profits thereof. If course of conduct were to prevail over the written contracts, then the parties continued in their usual course of conduct when denying the Permit Holders an opportunity to vote on the merger. The plaintiffs fail to refute the defendants' evidence that when there was a merger of NYBOT's two predecessor exchanges --the Coffee Exchange and the Cotton Exchange, between 1989 through 2004, the Permit Holders did not vote, as did the Equity Members, nor was there a share in the proceeds by the Permit Holders (*Hirschfeld Affidavit* ¶ 19).

The Permit Holders also continue to argue that to dismiss their claims would effectively allow the defendants to leave them without rights and will strip their permits of any value. However, review of the SEC filings outlining the merger reveal that the holders of the former permits will, under the new permits, continue have the right to trade the same commodity contracts formerly authorized under the old (*Hirschfeld Affidavit Exhibit T*). Further, under the New NYBOT Permit Holder Agreement, the holders agree to be bound under the by-laws of the New NYBOT which will exist after the ICE merger (*Hirschfeld Exhibit Y*). Nowhere within these new by-laws do the plaintiffs point to provisions which will cause them to lose any of the rights which they are currently enjoying. There is no basis, upon review of the documentary evidence, to conclude they may be stripped of any of their rights as Permit Holders under the Old NYBOT.

Furthermore, plaintiffs argument that somehow the court's interpretation of the relationship between the parties fails for lack of mutuality of obligation by the defendants is also unavailing. Under the trading permits, NYBOT was obligated to allow Permit Holders to trade

on the Exchange trading floor and to process trades properly presented by the Permit Holders. For their part, Permit Holders were obligated to adhere to the NYBOT rules and by-laws. Contrary to Plaintiffs' erroneous assertions, the test of mutuality of obligation is met for the Trading Permits, and there is no need to infer any additional terms (*See Zurakov v Register.com, Inc.*, 304 AD2d 176 [1st Dept 2003]).

Lastly, there can be no breach of the covenant of good faith and fair dealing, because the plaintiffs seek to create contract rights that are specifically negated by the express language of NYBOT by-laws and rules (*See Fesseha v TD Waterhouse Investor Services*, 305 AD2d 268 [1st Dept 2003]). Because the covenant cannot create new rights or obligations, this argument fails as well.

Accordingly, based on the foregoing, the eighth, ninth, tenth and eleventh causes of action for breach of contract must be dismissed.

#### Sixth Cause of Action

The sixth cause of action is for unjust enrichment. To maintain a cause of action for unjust enrichment, one must plead, (1) the defendant has retained something of value and (2) the plaintiff had the right to receive that item of value (*Citibank, N.A. v Walker*, 12 AD2d 3d 480, 481 [2 nd Dept 2004]). The essential inquiry is whether it is against equity to allow the defendant to retain what is sought to be recovered (*Paramount Film Distribution Corp. v State*, 30 NY2d 415, 421 [1972]).

This court has already found the permit holders were not "members" entitled to receive a share of the proceeds of the ICE merger. Furthermore, the cause of action is negated by the terms of Section 101(b) of NYBOT's by-laws which specifically states that Permit Holders "will not

have . . . any rights to receive any distributions of case, securities or other property, whether on dissolution, liquidation, merger, consolidation or otherwise. Therefore the documentary evidence clearly refutes the allegation that the defendants are withholding property which plaintiff is entitled to receive.

Accordingly, the sixth cause of action is dismissed.

Seventh Cause of Action

The seventh cause of action is for estoppel. To successfully plead a cause of action for estoppel, a plaintiff must allege that they lacked knowledge or the means to obtain knowledge of the truth regarding matters (*Thoma v Town of Schodack*, 6 AD3d 957, 959 [3d Dept 1999]). In this matter, the plaintiffs seek to bar the defendants from asserting a position that the Permit Holders are not members and that their rights cannot be unilaterally reduced without their consent (*Complaint* ¶ 47). Therefore, the plaintiffs must allege that they could not have known (1) they are not members of NYBOT and (2) that their rights as Permit Holders were subject to change without their approval in the event of changes to NYBOT's by-laws and rules.

Plaintiffs claim cannot stand because they have failed to plead that they could have not known they were not "members" within the meaning of the NPCL, or that they were not members entitled to participate in the ICE merger. The NYBOT by-laws and rules, which were publicly released in June 2004, cannot be any clearer. They state that Permit Holders "shall not have any of the rights and privileges of Equity Membership . . . shall not constitute "members within the meaning of the NPCL and shall not have any of the rights of privileges of "members under the NPCL . . .[and] will not have any voting rights in the Exchange or any rights to receive distributions . . .on dissolution, liquidation, merger, consolidation, or otherwise."

Plaintiffs cannot allege they were without knowledge of their rights as Permit Holders or that they were unaware of the terms of their trading privileges. The by-laws cannot be clearer when they speak of the Permit Holders rights nor the application for membership as a Permit Holder be clearer when it states that one bound by the agreement agrees to “all the provisions of the certificate of incorporation, by-laws, rules, resolutions, orders, decisions, awards, requirements and procedures of the Exchange as now in effect, hereafter adopted or hereafter amended” (*ARH Aff, Exhibit E*, p. 4).

Lastly, the plaintiffs have failed to allege detrimental reliance in order to successfully bring an estoppel claim (*Brooks v Citicorp*, 245 AD2d 12,12 [1st Dept 1997]). The complaint is completely void of any allegation that the plaintiffs did anything in reliance upon NYBOT’s alleged statements which led to their detriment.

Accordingly, the seventh cause of action for estoppel must be dismissed.<sup>4</sup>

*Fraud cause of action*

The defendants argue the cause of action for fraud must be dismissed as time barred. A fraud claim must be commenced within the longer of six years from the date of the fraud or two years from the date on which the plaintiff could with reasonable diligence have discovered the fraud (*CPLR 213.8*).

The plaintiffs argue they could not have been aware of the defendants fraud until September or October 2006 when the merger was first announced and a meeting held with the Permit Holders. They also plead within their complaint various misrepresentations made to

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<sup>4</sup>The court also notes that the plaintiffs in opposition to the motion to dismiss fail to oppose defendants arguments seeking dismissal of the estoppel claim. Therefore, the causes of action for estoppel are dismissed on this ground as well.

them regarding their status as Permit Holders. The purported fraud is the failure of the defendants to treat Permit Holders as “members” for purposes of participating merger.

The plaintiffs do not contest the defendants showing that when the Coffee Exchange and the Cotton Exchange began their merger in 1998, there was no right exercised by the Permit Holders, known at the time as Associate Members, to participate in the merger through voting and to receive proceeds. As far back as 1998, the plaintiffs had clear notice of their limited rights as Permit Holders with NYBOT. These limited rights were again reinforced in June 2004 when NYBOT’s by-laws were made public.

Therefore, the plaintiffs clearly had notice, arguably at the very latest, as far back as 2004 of their limited rights as Permit Holders. Accordingly, the fraud claim is time barred.

Second, the documentary record directly refutes the allegations of fraud plead in the complaint. For this reason, the plaintiffs must come forward with more than the allegations plead in the complaint or the affirmation of their counsel in order to defeat the motion to dismiss (*Teitler v Pollack & Sons*, 288 AD2d 302, 302 [2nd Dept 2001]).

Because the cause of action for fraud is dismissed, the claims for punitive damages must be dismissed as well.

*Fourteenth Cause of Action/Motion for a Preliminary Injunction*

The fourteenth cause of action seeks injunctive relief pending determination of trial. Plaintiffs have also filed a motion seeking a preliminary injunction. Because the court has found that the documentary evidence warrants dismissal of the complaint and that the plaintiffs have failed to plead a cause of action, then the fourteenth cause of action must be dismissed and the motion for preliminary relief is denied.

**Conclusion**

Therefore, based on the foregoing, it is hereby

ORDERED the motion to dismiss the complaint is granted in its entirety and it is further

ORDERED that the motion for a preliminary injunction is denied.

This shall constitute the Order and Decision of the Court.

Dated: March 28, 2007

ENTER:



J.S.C.  
HON. RICHARD B. LOWE, III

**FILED**  
APR 06 2007  
NEW YORK  
COUNTY CLERK'S OFFICE