

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

Charles Edward Ramos

53

PRESENT: \_\_\_\_\_

PART \_\_\_\_\_

Justice

Index Number : 602510/2005

WEY, ALLISON L.

vs

NEW YORK STOCK EXCHANGE

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

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

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

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

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**FILED**

APR 16 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Motion is decided in accordance with  
accompanying Memorandum Decision.

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

Dated: \_\_\_\_\_

4/10/07

**CHARLES E. RAMOS**

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION  
-----X  
ALLISON L. WEY,

Plaintiff,

-against-

Index No. 602510/05

THE NEW YORK STOCK EXCHANGE, INC.  
and JOHN THAIN,

Defendants.  
-----X

Charles Edward Ramos, J.S.C.:

In motion 02, defendants, the New York Stock Exchange ("NYSE" or the "Exchange") and John Thain move, pursuant to CPLR 3212, for summary judgment, dismissing the complaint of plaintiff, Allison L. Wey.

In motion 03, defendants move to limit plaintiff's damages evidence at trial.

In motion 05, defendants move for a preliminary injunction restraining plaintiff's counsel Mark Krum from making statements to the press allegedly impugning the character, credibility and reputation of Mr. Thain and sanctioning plaintiff's counsel for making such statements in violation of New York's Code of Professional Responsibility. Defendants also seek relief arising from Mr. Krum's disclosure to the press of a document defendants marked "confidential" allegedly in violation of the parties' confidentiality agreement.

Background

Ms. Wey's family owned a seat on the NYSE for many years. Ms. Wey is married to Richard Wey, a floor trader at the NYSE for Bear Wagner Specialists, LLC ("Bear Wagner"). In 2000, plaintiff

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purchased the seat from her father for \$1,100,000. She leased the seat to Bear Wagner and finally sold her seat on March 21, 2005 for \$1,540,000.

The NYSE was a not-for-profit organization until March 7, 2006. The owners of the NYSE were 1,366 "seatholders". Mr. Thain has been the NYSE's Chief Executive Officer since January 15, 2004 for the (then non-profit) NYSE, and currently holds the same titles for NYSE Group, Inc., a for-profit, publicly traded entity. On April 20, 2005, approximately one month after Ms. Wey sold her seat, the NYSE announced that it would merge. Immediately thereafter, on April 25, 2005, a seat on the NYSE sold for \$2,400,000. Seat prices stayed in that range until July 2005. Sixty seats were sold between April 20, 2005 and December 31, 2005.

#### Merger Negotiations

On January 5, 2005, Archipelago Holdings LLC ("Archipelago"), through the investment bank Goldman Sachs ("Goldman"), approached the NYSE for the first time to inquire whether the NYSE would meet with Archipelago to consider a possible transaction. In January 2005, Mr. Thain and Gerald Putnam, Archipelago's CEO, spoke (at least twice) regarding the general outlines of a possible transaction. Thain 10/26/05 Dep. at 41:19-44:10. A number of meetings followed. David Schwimmer, an investment banker at Goldman who acted as facilitator to the transaction, also attended a number of these meetings with Thain and Putnam. Id. at 41:11-18.

On February 3, 2005, NYSE management briefed the NYSE board of directors on the status of its evaluation of possible strategic alternatives, including its preliminary discussions with Archipelago. NYSE Group, Inc., SEC Registration Statement filed 11/3/05 at 59.

On February 10, 2005, NYSE and Archipelago entered into a confidentiality agreement, making it possible for non-public information designated as confidential to be exchanged for the first time. See Confidentiality Agreement dated 2/10/05.

On February 14, 2005, preliminary due diligence between the NYSE and Archipelago began. NYSE Group, Inc., SEC Registration Statement filed 11/3/05 at 61, 63. Due Diligence continued for over two months. See Goldman Sachs Proposed Time-line dated March 29, 2005.

#### The Meeting

Meanwhile, on February 15, 2005, Mr. Wey attended a closed-door, invitation only breakfast meeting<sup>1</sup> where Mr. Thain was to have an open dialogue with "working members"<sup>2</sup> of the exchange.<sup>3</sup>

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<sup>1</sup> According to the breakfast meeting memo of February 15, 2005, the invitees and their backgrounds are as follows: Jim McDevitt (specialist), Rick Wey (specialist, owns seat), Glenn Carell (specialist), Rich Como (top floor broker), Frank Cataldo (independent seat owner), Larry Lograno (runs floor for Wachovia), Dan Tandy (runs direct access firm), Randy Beller (broker), Mike O'Conner (specialist), Steve Steinthal (specialist).

<sup>2</sup> The memo refers to "floor members" while Mr. Tandy used the term "working members" during his deposition.

<sup>3</sup> Seatholders on the NYSE were also referred to as "members" of the NYSE. "Working members" hold seats and work on the floor of the exchange.

Daniel Tandy<sup>4</sup> 6/13/06 Dep. at 116:15-117:21. Mr. Wey attended the breakfast meeting for the sole purpose of asking Mr. Thain if the NYSE was going public, and based on the answer, would make an informed decision, along with his wife, whether or not to sell her seat. R. Wey 8/8/06 Dep. at 106:5-8; A. Wey 9/12/06 Dep., 247:10-248:11; 477:20-479:21. Mr. Wey testified that during the breakfast meeting, he asked Mr. Thain "Are we going public?" Mr. Thain responded, "our first priority is hybrid trading." R. Wey 8/8/06 Dep., 223:15-16. Mr. Wey again posed the question "I understand your concerns there, but are we (the NYSE) going public?" Id. at 225:18-19. Mr. Thain responded "No, we're not going public. The guys on Wall Street and Broad don't get it. It would take one to two years for us to go public, and there are no plans for that to happen." Id. at 226:5-8. Mr. Thain has no specific recollection of Mr. Wey's questions nor of his own responses at the breakfast meeting. Thain 8/9/06 Dep., 18:2-10.

#### The Merger

Under the merger plan with Archipelago, seatholders were entitled to receive \$300,000 in cash and 80,177 shares of NYSE Group, subject to a variety of lock-up restrictions.<sup>5</sup> Seatholders could also make a cash election or a stock election. On March 10, 2006, each seatholder as of March 6, 2006 was paid

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<sup>4</sup> Daniel Tandy is a former member of the NYSE's Board of Executives and helped select invitees to the 2/15/05 breakfast meeting.

<sup>5</sup> Trading opened at \$67 per share and increased to approximately \$100 where it remains today.

\$70,570.78 in dividends per seat owned.

On July 13, 2005, the day after the complaint was filed, a seat was sold for \$2,410,000. However, plaintiff's expert, Mr. Pomerantz, seeks to measure damages by the difference between the price of plaintiff's seat in March 2005 (when she sold it) and the price of NYSE Group shares in May 2006, November 2006, March 2008 and March 2009. Among other things, Mr. Pomerantz assumes that Ms. Wey would not have sold her seat before December 31, 2005 because only 60 seatholders, or less than 5%, sold their seats during that period after the merger announcement up to December 31, 2005.

Plaintiff alleges claims for fraudulent misrepresentation, negligent misrepresentation and breach of fiduciary duty.

#### Summary Judgment Standard

In order to grant summary judgment, the court must determine whether a material and triable issue of fact exists. *See Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, Rehearing denied, 3 NY2d 941 (1957). After the movant makes a prima facie case, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a material issue of fact that requires a trial. *Winegrad v New York Medical Univ. Med. Cen.*, 64 NY2d 851 (1985). When deciding a motion for summary judgment, the court must view the evidence in a light most favorable to the party opposing the motion and must give that party the benefit of every inference which can be drawn from the evidence. *See Assaf v Topog. Cab Corp.*, 153 AD2d 520 (1st

Dept 1989).

However, on a motion for summary judgment to dismiss the complaint, if it is determined that due to a lack of competent evidence, no reasonable jury could conclude the allegations, dismissal may be appropriate for lacking a material issue in dispute. See *Speller v Sears, Roebuck & Co.*, 100 NY2d 38 (2003).

#### Fraudulent Misrepresentation

In order to prove fraudulent misrepresentation, plaintiff must be able to show that the (1) defendants made a material false representation; (2) defendants intended to defraud the plaintiff thereby; (3) plaintiff reasonably relied upon the representation; and (4) plaintiff suffered damage as a result of the reliance. *J.A.O. Acquisition Corp. v Stavitsky*, 18 AD3d 389 (1<sup>st</sup> Dept 2005).

Plaintiff asserts that as to the second and third elements (intent to defraud and reasonable reliance) she will prove at trial that Mr. Thain had reason to expect Ms. Wey, who was not at the February meeting, to rely on Mr. Thain's statement to Mr. Wey and the others attending the meeting. Plaintiff, without citing one case, urges this Court to rely on the "reason to expect" theory of fraud under Restatement (Second) of Torts § 533 which provides:

The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has *reason to expect* that its terms will be repeated or its substance communicated to the other, and that it will *influence his conduct* in the transaction or type of transaction involved. *Emphasis*

*supplied.*

As defendants correctly point out, under this theory, plaintiff fails to demonstrate competent evidence that Mr. Thain had a reason to expect that Mr. Wey would communicate the statement to *this* particular plaintiff, his wife.

Mr. Wey, who attended the breakfast meeting, is not the owner of the seat, but was listed as "owns seat" on a memo given to Mr. Thain prior to the meeting. The breakfast memo listed the names and describing backgrounds of the invitees at the closed-door meeting. Such a memo was typically made available to Mr. Thain prior to the breakfast meeting. Thain 8/9/05 Dep., 43:24-45:8. It is an issue of fact whether the memo was reviewed by Mr. Thain before his statement to Mr. Wey. Thain Dep 8/9/05, 51:7-52:13. Although the memo listed Mr. Wey as owning a seat, the memo made no reference to Ms. Wey. Mr. Wey even admits that Mr. Thain had no knowledge of plaintiff's ownership of the seat or that she was thinking about selling it. R. Wey Dep., 222:13-223:3.

Furthermore, § 533 would require Mr. Thain's statement to "influence (plaintiff's) conduct" to sell her seat. Ms. Wey admits in her deposition that she had no reason to believe that Mr. Thain (through his statement) was trying to get her to sell her seat. A. Wey 9/12/06 Dep., 285:12-17.

The same outcome bars plaintiff's proposed application of Comment c. to § 533 which provides:

The rule stated in this Section is applicable not only when the effect of the misrepresentation is to induce the other

to enter into a transaction with the maker, but also when he is induced to enter into a transaction with a third person. No evidence supplied by plaintiff suggests that Mr. Thain had a reason to expect that Ms. Wey would be induced to enter a transaction with a third person.

However, Restatement (Second) of Torts § 531, broadens the scope of § 533 to "class of persons" intended or reasonably expected to act in justifiable reliance on the statement. Defendants fail to address § 531. The Court agrees with plaintiff's proposed application of this provision of the Restatement. Restatement (Second) of Torts § 531 provides:

One who makes a fraudulent misrepresentation is subject to liability to the persons or *class of persons whom he intends or has reason to expect to act . . . in reliance* upon the misrepresentation, for pecuniary loss suffered by them through their justifiable reliance in the type of transaction in which he intends or has reason to expect their conduct to be influenced. *Emphasis supplied.*

The Court finds that a reasonable jury could conclude that Mr. Thain had reason to expect that his statement about the future of the NYSE to a group of "floor traders," some of which Mr. Thain knew currently owned seats on the exchange, would be justifiably influenced to act (i.e. trade, etc) in reliance on the statement. Therefore, triable issues of material fact exist and the claim must be determined by a fact finder.

This Court is not alone in relying on § 531 under similar circumstances. Indeed, its application in New York has a long history. Federal courts applying New York law, as well as New York courts have applied the "class of persons" expansion to fraudulent misrepresentation claims.

In *Greene v Mercantile Trust Co.*, 60 Misc. 189 (Sup. Ct, Erie County, affirmed, 128 AD 914 (4th Dept 1908)), plaintiff's action for fraud and deceit was upheld against defendant corporation for inducing him to purchase shares of the corporation by means of false and fraudulent misrepresentations in a prospectus. The court opined:

"where one makes false representations, known to be such and intended to influence another, and which come to the latter's knowledge, and in reliance on which he in good faith parts with property or incurs an obligation, the one making the representations renders himself liable for the damages sustained, and it is not necessary that the representations be made to plaintiff personally; it being sufficient that they are made to the public at large for the purpose of influencing any one who may act on them."

Id. See also, *Brackett v Griswold*, 112 NY 454 (1889) (Court of Appeals applied a similar standard on a fraudulent misrepresentation claim regarding a false corporate prospectus).

In *Wechsler v Hoffman-LaRoche, Inc.*, 198 Misc. 540, (Sup. Ct, Bronx County 1950), a fraud claim was upheld by a third-party against a drug manufacturer that misrepresented the drug's fatal propensities to the prescribing doctor. The court opined:

"Reliance upon fraudulent representations by persons who are not the direct addressees thereof but who may be intended or expected to learn of and act upon such representations will found an action in fraud and deceit."

Id. at 590, *aff'd as modified*, 279 AD 654 (1951).

In *Ultramares Corp. v Touche*, 255 NY 170 (1931), Justice Cardozo explained that "[accountants] owed to their employer a duty imposed by law to make their certificate without fraud. . . to creditors and investors to whom the employer exhibited the certificate, since there was notice in the circumstances of its

making that the employer did not intend to keep it to himself." Id. at 179. See also, *Berkowitz v Baron*, 428 F Supp 1190 (SDNY 1977), (defendant knowingly participated in the issuance of a false and materially misleading accounting report of company upon which plaintiffs relied and bought stock; the court held "in order for [defendant] to be liable to these plaintiffs, they must be within the class of persons that [defendant] should reasonably have expected to rely on them"). Id. at 1196.

Applying the threshold requirement of *Ultramares*, in order for Mr. Thain to be liable to this plaintiff, Ms. Wey must be within the class of persons (seatholders on the exchange) that Mr. Thain should reasonably have expected to rely on his statements. See *American Elec. Power Co. v Westinghouse Elec. Corp.*, 418 F Supp. 435, 450 (SDNY 1976). Here, it is undisputed that Ms. Wey was in fact a seatholder at the time of Mr. Thain's statement. Therefore, a reasonable jury could conclude that Mr. Thain intended that seatholders, as a class, would reasonably rely on his statement.

As to the element of falsity, which includes not only that the statement was in fact false, but also that defendant had knowledge that the statement was false [*Gerald Modell, Inc. v Schraeder*, 6 Misc3d 1013A (Sup. Ct. NY County 2004)], defendants argue that there is no evidence that Thain intended to make a misrepresentation because he testified during his deposition that he thought his statement was true. Even though Mr. Thain claims to have no specific knowledge of Mr. Wey's question or his own

response at the breakfast meeting, Mr. Thain testified that he would have understood Mr. Wey's question, "are we going public" to be asking whether the NYSE was planning to undertake an initial public offering ("IPO"). Thain 8/9/06 Dep., 22:14-23:7.

In David Schwimmer's prior testimony in a related case<sup>6</sup> and his deposition in this case Mr. Schwimmer testified that at a meeting with Mr. Thain on January 24, 2005, he presented him with two "possible transaction structures that might work" between the NYSE and Archipelago. Schwimmer 12/8/06 Dep., 67:7-16; 68:3-7; Schwimmer Trial Testimony, November 14, 2005, *Higgins v The New York Stock Exchange*, 10 Misc. 3d 257, (Sup Ct, NY County, 2005, J. Ramos), 68:10-18. The first was an "outright acquisition" which would involve a "cash acquisition of Archipelago at a market cap plus a premium." Schwimmer Trial Testimony, 68:19-20; Schwimmer 12/8/06 Dep., 68:19-69:8. This structure would involve an initial public offering ("IPO") process, that would take unusually two to four years to complete. Schwimmer Trial Testimony, 169:24-171:14. The second was a "merger" between the two entities, the result of which would create a new public corporation without the need for an IPO. Schwimmer 12/8/06 Dep., 72:9-17. After discussing the advantages and disadvantages of each structure, Mr. Thain agreed to pursue structure two, the merger structure. Schwimmer Trial Testimony, 70:2-71:6.

Therefore, Mr. Thain was aware and was considering (as of

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<sup>6</sup> November 14, 2005, *Higgins v The New York Stock Exchange*, 10 Misc. 3d 257, (Sup Ct, NY County, 2005, J. Ramos).

January 24, 2005) an alternative transaction structure that could facilitate the NYSE to become a public entity without an initial public offering. This second (merger) structure was the same or similar structure that was subsequently executed between the two entities. Schwimmer Trial Testimony, 167:22-168:5. This discrepancy raises the issue of Mr. Thain's credibility, an issue best left to a trier of fact. See e.g. *Lapidus v New York City Chapter of New York State Asso. for Retarded Children, Inc.*, 118 AD2d 122, 129 (1<sup>st</sup> Dept 1986).

Furthermore, the facts alleged relative to actual falsity of Mr. Thain's statement are disputed. Defendants list a time-line of events contending that no reasonable jury could conclude that the NYSE had plans to go public as of February 15, 2005.

Plaintiff, however, alleges that even though the merger agreement was not yet signed between the NYSE and Archipelago at the time of Mr. Thain's statement, negotiations were well underway. For example, a framework for negotiation was accepted by the CEOs of both parties. Richard M. Phillips 11/17/2006 Dep. 169:1-13. The parties intended to move rapidly (one of the goals was to achieve a structure allowing the NYSE become a public entity as soon as possible. Schwimmer Trial Testimony, 170:3-7. The negotiations could lead to the NYSE becoming a public entity (after all appropriate approvals) "immediately." Schwimmer Trial Testimony, 171:18-172:8.

Therefore, defendants' contention that no reasonable jury could conclude that the NYSE had plans to go public as of the

date of Mr. Thain's statement is rejected.

Finally, there is no dispute as to whether plaintiff has been damaged. Rather, if successful in proving the liability of defendants, the measure of damages is disputed.<sup>7</sup>

#### Negligent Misrepresentation

Count two must be dismissed as a matter of law because Mr. Thain did not make the statement to plaintiff and he had no notice that Mr. Wey was acting on plaintiff's behalf.

The Court of Appeals has held that before a party may recover in tort for pecuniary loss sustained as a result of another's negligent misrepresentations there must be a showing of a special relationship, that being, actual privity of contract between the parties or a relationship so close as to approach that of privity. *Prudential Ins. Co. v Dewey Ballantine, Bushby, Palmer & Wood*, 80 NY2d 377 (1992), Reconsideration denied, 81 NY2d 955 (1993). The special relationship must be one of "trust or confidence, which creates a duty for one party to impart correct information to another." *Hudson River Club v Consolidated Edison Co. of New York, Inc.* 275 AD2d 218, 220 (1<sup>st</sup> Dept 2000). The special relationship requires a closer degree of trust than that in an ordinary business relationship. See *Dorsey Products Corp. v United States Rubber Co.*, 21 AD2d 866 (1<sup>st</sup> Dept 1964), affirmed 16 NY2d 925 (1965).

Further, if no actual privity exists (as neither party here

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<sup>7</sup> A detailed analysis of the measure of damages is discussed below with regard to defendants' motion in limine to preclude plaintiff's damages calculation.

contends), plaintiff must prove "(1) an awareness by the maker of the statement that it is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance." *Parrott v Coopers & Lybrand, LLP*, 95 NY2d 479 (2000) [citing *Prudential Ins. Co. Of America v Dewey, Ballantine, Bushby, Plamer & Wood*, 80 NY2d 377, 384 (1992)].

Ms. Wey was not a "known party" to Mr. Thain at the time of the speaking. "[G]enerally, a negligent statement may be the basis for recovery of damages where there is carelessness in imparting words upon which others were expected to rely and upon which they did act or failed to act to their damage, but such information is not actionable unless expressed directly, with knowledge or notice that it will be acted upon, to one to whom the author is bound by some relation of duty, arising out of contract or otherwise, to act with care if he acts at all." *White v Guarente*, 43 NY2d 356, 363 (1977). *Emphasis supplied*. (Internal citations omitted).

Here, it is of no consequence if Mr. Thain "knew" that Mr. Wey was an owner of a seat because Mr. Wey is not the plaintiff. It is undisputed that Mr. Thain's statement was not "expressed directly" to plaintiff Ms. Wey and no evidence is provided that could impute knowledge to Mr. Thain that Mr. Wey was acting in an agency capacity for his wife. See e.g. *De Atucha v Mfg. Trust Co.*, 155 NYS2d 537 (no official citation) (Sup Ct, NY County,

1956), *aff'd*, 3 AD2d 902 (1<sup>st</sup> Dept) (a negligent misrepresentation claim by a third-party may proceed if an agency or representative relationship existed and the defendant had actual knowledge of it), appeal denied, 3 AD2d 1004, appeal denied, 3 NY2d 706 (1957). Plaintiff has failed to set forth any evidence to support such a jury determination, thus the second cause of action must be dismissed as a matter of law.

#### Breach of Fiduciary Duty

Defendants' motion for summary judgment dismissing the third cause of action for breach of fiduciary duty is denied because triable issues of material fact exist.

In the complaint, plaintiff alleges that Mr. Thain breached his fiduciary duty in making a false and/or materially misleading statement at the breakfast meeting on February 15, 2005.

A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation. *EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11 (2005) (Emphasis supplied).

Defendants argue that Mr. Thain was not acting in the scope of the relationship with plaintiff as a seatholder because the breakfast meeting was a "private meeting with floor traders." However, the memo identified Mr. Wey as a "specialist and owner" and others as "floor members" or seatholders. Plaintiff asserts that Mr. Thain's alleged false statement was a breach of fiduciary duty to the "class of seatholders," giving rise to

plaintiff's individual cause of action (whether Mr. Wey had asked the question or not). This raises a disputed issue. That is, the purpose of the breakfast meetings. According to Mr. Thain and Mr. Tandy, the purpose of all the breakfast meetings was to:

"have a dialogue with the people on the exchange who don't have an opportunity... to talk to me very often, to have them ask questions, express concerns etcetera." Thain 8/9/05 Dep., 12:7-12.

"provide access from the various people on the floor who otherwise didn't typically have access to me, to ask questions to me, to make comments, the types of questions...ranged from the market structure to business strategy to ownership structure to seat values and lease rates..." Mr. Thain 8/9/05 Dep., 79:10-20.

"update members in smaller groups...[because] the town hall meetings became very dominated by lessors, and it became very difficult for working members to get their questions answered..." Tandy 6/13/06 Dep. 116:23-117:4.

"we were more focused on day-to-day, you know, what's it going to mean to me. So, John [Mr. Thain] agreed to do smaller group meetings to inform us better in terms of what his views were and what he thought...the future was going to look like." Tandy 6/13/06 Dep. 117:9-15.

"anything was on the table... he was very good about allowing questions on any topic." Tandy Dep. 117:19-21.

Given these somewhat inconsistent viewpoints, the Court is unable to rule as a matter of law, whether Mr. Thain was acting in the scope of his relationship with seatholders while conducting these meetings. Thus, the claim stands and must be presented to a trier of fact.

If a jury determines that Mr. Thain was not acting in the scope of his relationship with seatholders, no fiduciary duty can be breached. However, if answered in the affirmative, the issue of "inaccurate, incomplete, or misleading prior disclosures"

becomes a central issue. See *Hyman v The New York Stock Exchange, et al.*, 2007 NY Misc. LEXIS 143 (Sup Ct, NY County 2007, J. Ramos).

Generally, there is no duty to disclose confidential business negotiations. However, in *Lindner Fund, Inc. v Waldbaum, Inc.* 82 NY2d 219, 223 (1993), the Court of Appeals noted that a special duty to disclose may arise in the case of insider trading, a statute or regulation requiring disclosure, or inaccurate, incomplete, or misleading prior disclosures. If a jury should determine that Mr. Thain's statement was incomplete or otherwise misleading, in accord with *Lindner*, a duty to immediately rectify the disclosure "springs into being." *Lindner*, 82 NY2d at 223.

Defendants contend that Mr. Thain's statement at the breakfast meeting was warranted because he was operating under a February 10, 2005 confidentiality agreement obligating him not to disclose the status of discussions concerning a potential transaction between the parties.

This Court does not agree. New York courts have recognized the need for confidentiality in merger negotiations to avoid speculative or premature market fluctuations. *Lindner*, 82 NY2d at 223. However, Mr. Thain's actions were arguably in contravention of the confidentiality agreement and *Lindner*. Confidentiality is the state of having the dissemination of certain information restricted. Blacks Law Dictionary, Seventh Edition, Page 294. This is achieved by refusing to speak on the

issue. Fact or fiction, Mr. Thain chose to speak at the breakfast meeting with regard to the future of the NYSE. As *Lindner* instructs, if a fiduciary chooses to disclose information to shareholders, it must be accurate, complete, and not misleading. *Lindner*, 82 NY2d at 223. This determination is a question for a jury. See e.g. *Curanovic v NY Cent. Mut. Fire Ins. Co.*, 307 AD2d 435 (3<sup>rd</sup> Dept 2003) (whether a statement is materially misleading is a question of fact that requires denial of...[a] motion for summary judgment). Thus, the motion is denied as to count three.

#### In Pari Delicto and Unclean Hands

Defendants contend the Weys' concerted effort to have Mr. Wey attend the breakfast meeting to solicit inside information from Mr. Thain and make a trade based on that disclosure, bars plaintiff from relief under principles of equity. See R. Wey 8/8/06 Dep. 106:5-8; 195:9-25; 105:22-106:8; A. Wey 9/12/06 Dep. 244:18-245:3; 247:10-248:11; 477:20-479:21.

To this end, defendants raise two related equitable defenses. *In pari delicto* which literally means "in equal fault," and *unclean hands*, which stands for the proposition that a plaintiff may not profit from her own wrongdoing. *Riggs v Palmer*, 115 NY 506 (1889); *Reno v D'Javid*, 55 AD2d 876 (1<sup>st</sup> Dept, affirmed, 42 NY2d 1040 (1977)). First, unclean hands is an equitable defense that is unavailable in an action exclusively for damages. *Manshion Joho Ctr. Co., Ltd. v Manshion Joho Ctr., Inc.*, 24 AD3d 189 (1<sup>st</sup> Dept 2005) [citing *Hasbro Bradley, Inc. v Coopers &*

*Lybrand*, 128 AD2d 218 (1<sup>st</sup> Dept 1987)]. This is an action at law; thus, unclean hands is inapplicable to this case.

The defense of *in pari delicto* is grounded on two premises: (1) courts should not lend their good offices to mediating disputes among wrongdoers; and (2) denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality. *Bateman Eichler, Hill Richards, Inc. v Berner*, 472 US 299 (1985). *In pari delicto* requires immoral or unconscionable conduct that makes the wrongdoing of the party against which it is asserted at least equal to that of the party asserting it. *Chemical Bank v Stahl*, 237 AD2d 231 (1<sup>st</sup> Dept 1997).

The *in pari delicto* defense is used sparingly. *Alami v Volkswagen of America, Inc.*, 97 NY2d 281, 287-8 (2002). See *Perma Life Mufflers, Inc. v International Parts Corp.*, 392 US 134 (1968) (not recognizing *in pari delicto* defense in Clayton Antitrust action). The Weys' alleged wrongdoing was an attempt to trade using insider information, possibly a criminal violation of federal and state securities laws. *Dirks v SEC*, 463 US 646 (1983); *People v Napolitano*, 282 AD2d 49 (1st Dept 2001), appeal denied, 96 NY2d 866 (2001). Accordingly, we can look to federal securities litigation for guidance. See *Ross v Bolton*, 904 F2d 819 (2d Cir 1990) (recognizing defense in securities cases). To ensure that the defense is narrowly applied in such cases, the Supreme Court in *Bateman Eichler, Hill Richards, Inc. v Berner supra*, set forth a two-part test for the application of the defense in private causes of action under securities laws.

*Bateman Eichler*, 472 US at 310-11. The Court noted that the doctrine may bar an action "where (1) as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress, and (2) preclusion of suit would not significantly interfere with the effective enforcement of the securities laws and protection of the investing public." *Id.*

The first prong of the test sets forth the essential elements of the doctrine. See *Pinter v Dahl*, 486 US 622 (1988). Courts apply the defense where the plaintiff has participated in some of "the same sort of wrongdoing" as the defendant. *Bateman Eichler*, 472 US at 307.

"A defendant cannot escape liability unless, as a direct result of the plaintiff's own actions, the plaintiff bears at least substantially equal responsibility for the underlying illegality. The plaintiff must be an active, voluntary participant in the unlawful activity that is the subject of the suit..." *Pinter*, 486 US at 636.

The process of weighing these faults is the function of the jury. See *Banks v Central Hudson Gas & Electric Corp.*, 224 F2d 631 (2d Cir, cert denied, 350 US 904 (1955)).

The second prong, which considers public policy implications of applying the defense, is consequential of the first. As the Supreme Court noted in *Pinter*, refusal of relief to those less blameworthy would frustrate the purpose of the securities laws; it would not serve to discourage the actions of those most responsible for organizing forbidden schemes; and it would sacrifice protection of the general investing public in pursuit

of individual punishment. *Pinter*, 486 US at 636.

The Court queries whether this defense, as applied to the facts here, is dispositive of the action. Assuming for the purpose of this motion only Mr. Thain's alleged wrongful conduct, if no reasonable jury could conclude that Mr. Thain's alleged misrepresentation and breach of fiduciary duty is substantially equal to or outweighs plaintiff's wrongful conduct of seeking insider information from Mr. Thain, a possible violation of criminal law, then the action must be dismissed. The question is whether plaintiff actually attempted to violate the federal insider trading law or any other law and if so whether, as a matter of law, that would overwhelm any bad act by Mr. Thain. *People v Napolitano, supra*; *Country-Wide Home Loans, Inc. v LaFonte*, No. 14265/01, 2003 WL 1389089, at \*3 (Sup Ct, Nassau County 2003); *Drexel Burnham Lambert Group, Inc. v Vigilant Ins. Co.*, 157 Misc 2d 198, 212-214 (Sup Ct, NY County 1993). For example, was Mr. Thain or Mr. Wey a tipper, and if so, what are the consequences? *Dirks v SEC*, 463 US 646 (1983); *People v Napolitano, supra*. Even, if Wey's act was not criminal, *in pari delicto* could still apply. See also, *Smith v Jay Apartments, Inc.*, 33 AD2d 624 (3d Dept 1969) (negligent landlord's complaint against elevator company dismissed because landlord was *in pari delicto* for knowing about condition of elevator but failing to warn tenants), appeal denied, 26 NY2d 609 (1970). Therefore, the parties are instructed to brief the issue within thirty days after service of this order with notice of entry. The parties

are to simultaneously exchange briefs solely addressing the *in pari delicto* defense. Replies shall be exchanged thirty days thereafter. The parties shall deliver copies of their briefs to the Court's part clerk, Room 238 and call the part clerk to schedule a mutually agreeable date and time for argument.

#### Claims Against the NYSE

Plaintiff alleges that the NYSE is vicariously liable for Mr. Thain's alleged wrongful acts. The NYSE motion to dismiss the breach of fiduciary duty claim is granted as a corporation, even a non-profit organization, has no fiduciary duty to its shareholders, or seatholders in this case. See *Gates v BEA Assoc., Inc.*, NO. 88 Civ. 6522, 1990 WL 180137, at \*6 1990 US Dist Lexis 15299 (SDNY 1990). Having dismissed the negligent misrepresentation claim, the only remaining claim against the NYSE is vicarious liability for Thain's alleged misrepresentation.

#### Damages

In the complaint, plaintiff seeks unspecified damages. In a New York Post article, Mr. Krum was quoted as saying that Ms. Wey would be seeking damages of "'at least \$1 million,' plus other, unspecified damages." In the note of issue, dated December 13, 2006, plaintiff demands \$4,384,561.

There is no dispute that if plaintiff establishes liability, she is entitled to damages. The issue is what constitutes the proper measurement of damages?

The true measure of damage is indemnity for the actual pecuniary loss sustained as the direct result of the

wrong" or what is known as the "out-of-pocket" rule [citation omitted]. Under this rule, the loss is computed by ascertaining the "difference between the value of the bargain which a plaintiff was induced by fraud to make and the amount or value of the consideration exacted as the price of the bargain" [citation omitted]. Damages are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained. [citation omitted]. Under the out-of-pocket rule, there can be no recovery of profits which would have been realized in the absence of fraud [citations omitted].

*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 (1996). Plaintiff challenges the applicability of Lama Holdings to this case. Lama Holding Co. owned 24% of the shares of Smith Barney and had a right of first refusal on any merger with Smith Barney, pursuant to a complex tax structure in the United States Tax Code, known as the General Utilities Doctrine, which allowed a domestic company to sell its assets without incurring tax liability. *Id.* at 419-420. When Smith Barney agreed to sell all of its stock to Primerica, Smith Barney met with Lama to induce it to agree to the merger immediately without the advice of legal or financial counsel. *Id.* at 419. Unbeknownst to Lama, months earlier, Congress had changed the Tax Code repealing the General Utilities Doctrine. Lama contended it was fraudulently induced to agree to the merger which resulted in a tax liability to Lama of \$33 million. *Id.* at 420. Lama alleged fraud based on Smith Barney's failure to disclose that Primerica could withdraw from the merger if 5% of common stockholders did not approve the transaction nor the tax consequences of the sale. *Id.* In other words, with 24% of the shares, and had it known, Lama could have

stopped the merger. Lama attempted to negotiate a separate purchase transaction with Primerica, but it refused. *Id.* The court held that Lama could not measure its damages based on Lama's proposed deal with Primerica as it was speculative. *Id.* at 422.

Plaintiff argues that the *Lama* case is inapplicable here as Ms. Wey's alternative contractual bargain was concrete and embodied in the merger terms offered to the seatholders. However, this is not a breach of contract action, but a fraud case and thus *Lama* clearly applies. Here, the undisclosed deal, to merge with Archipelago, closed, just as the undisclosed deal in *Lama*, Smith Barney with Primerica, closed. Plaintiff cannot in hindsight compare the certainty of the merger here with the uncertainty of the deal *Lama* proposed to Primerica. Likewise, in hindsight, plaintiff proposes that the merger terms are concrete. But until the deal closed on March 7, 2006, there was always a risk that the merger would not occur and the market price of seats would reflect that risk.

Defendants' motion is granted as plaintiff's proposed measure of damages is too speculative. While lost profits are recoverable in both fraud and contract actions, in either case they "may not be merely speculative, possible or imaginary, but must be reasonably certain and directly traceable to the breach, not remote or the result of other intervening causes." *Kenford Co. v County of Erie*, 67 NY2d 257, 261 (1986). Where contract damages are limited to those reasonably contemplated by the

parties, for fraud, the loss must naturally follow the wrongful act. *Schile v Brokhahus*, 80 NY 614, 620 (1880). Reasonable certainty is always required. *Delehanty v Walzer*, 59 NYS2d 777 (Sup Ct, Kings County 1945) (no official citation), *judgment rev'd on other grounds*, 271 AD 886, (2d Dept 1946), *judgment aff'd*, 298 NY 820 (1949). Multiple assumptions will doom a projection. *Kenford* at 262. Here, plaintiff assumes the following: (1) she would not have sold after the merger announcement; (2) she would have received annual lease income of \$200,000 even though her actual lease income was \$83,000 in 2005; (3) she would have elected the maximum cash payments between 2006 and 2009; (4) the NYSE stock price can be projected for March 2008 and March 2009. Depending on plaintiff's expert's underlying assumptions, plaintiff's estimated damages vary by as much as \$3 million. These multiple assumptions doom reasonable certainty.

The measure of damages for items of fluctuating value such as marketable securities will be the difference between the proceeds received and the highest market value within a reasonable time after notice of the fraud. *Gelb v Zimet Brothers, Inc.*, 34 Misc 2d 401, 402 (Sup Ct, NY County 1962), *aff'd*, 18 AD2d 967 (1st Dept 1963). The purpose of the reasonable time rule is to give plaintiff time to make decisions such as whether to repurchase securities. *Phillips v Bank of Athens Trust Co.*, 202 Misc 698, 702 (Sup Ct, NY County 1952).

What is a reasonable period of time? The period has ranged from one to four weeks after learning of the alleged fraud

depending on the circumstances of the case. *Mitchell v Texas Gulf Sulphur Co.*, 446 F.2d 90, 105 (10th Cir 1071) (9 days after date on which a diligent and reasonable investor would have been informed of April 16, corrected press release), cert denied, 404 US 1004 (1971); *Phillips, supra* at 703 (7 days after plaintiff notified defendant of his objections to the sale of his securities. "[Plaintiff's] delay and decision to do nothing was occasioned by his determination to speculate on the continued rise of the market. Such speculation at the expense of the defendant cannot be condoned by the court."); *Newman v Smith*, 1975 WL 389 at \*4, 1975 U.S. Dist. LEXIS 12686, Fed. Sec. L. Rep. (CCH) P95,078 (SDNY 1975) (17 days after notice of unauthorized sale of stock); *Halifax Fund LP v MRV Communications Inc.*, No. 00 CIV 4878 HB, 2001 WL 1622261, 2001 U.S. Dist. LEXIS 20933 (SDNY 2001) (3 weeks from notice of unauthorized sale to cover), *affm'd*, 54 Fed. Appx. 718, 2003 U.S. App. LEXIS 78 (2d Cir. 2003). Plaintiff's projection to 2009 is too far into the future, far too speculative, and not reasonable.

Plaintiff challenges whether the market price is an accurate reflection of value since the market for seats on the NYSE was small and inefficient. Plaintiff relies on the NYSE's acting Chairman's announcement on November 9, 2005 that the "imputed value" of NYSE seats was \$4.5 million when the seats were trading for \$3 million. Plaintiff also relies on *Scalp & Blade, Inc. v Advest Inc.*, 309 AD2d 219 (4th Dept 2003) for the proposition that this Court may not limit plaintiff's proof of damages on a

motion in limine.

In *Scalp & Blade*, a churning case, the lower court limited damages to the difference in value from the beginning of defendants control of the account and when defendants were removed from control of the account. *Id.* The Appellate Division reversed holding that plaintiffs could measure damages using a market index such as the S&P 500 to adjust for gains which may have occurred if the defendant had not been churning the account. *Id.* However, the time period remained the same.

This Court rejects plaintiff's procedural argument that defendants' motion is a disguised motion for summary judgment. Rather, a motion in limine is the appropriate vehicle to determine what evidence may be presented at trial regarding damages. *State v Metz*, 241 AD2d 192, 198 (1st Dept 1998).

This case also differs from *Scalp & Blade* in one significant way; in a churning case, the time period during which the market index is applied is fixed as the time during which defendant was in control of the account and churning it. Here, the time period for the calculation of damages is not fixed. Accordingly, the legal authority on this issue holds that a reasonable time is to be used.

Plaintiff's damages should be measured by the reaction of the market for NYSE seats within a reasonable time after the merger announcement. *Affiliated Ute Citizens of the State of Utah v United States*, 406 US 128, 155 (plaintiffs should be awarded, not the future value of their investments if they had

decided not to sell them at all, but the difference between what they actually received and the fair value of their investment at the time of their sale), rehearing denied 407 US 916 (1972). See also *Gelb, supra*. Assuming the parties cannot agree to a reasonable period, it will be determined by the jury. The parties are welcome to offer experts to testify why one value or time period is more accurate than another. "[I]nferences may be drawn from surrounding circumstances as to the period of time which is reasonable for the ascertainment of damages." *Phillips v Bank of Athens Trust Co.*, 202 Misc 698, 702 (Sup Ct, NY County 1952). However, the time period will be a reasonable one and in no case shall it extend beyond 60 days from the announcement. In 60 days or less, plaintiff would have had sufficient time to decide whether to re-purchase a seat and seek financing if necessary. Further, as in *Scalp & Blade*, plaintiff may convince the jury that the market price, within the 60 day period after the merger announcement, was not an accurate reflection of a seat's value and thus that a multiple should be applied to the market price.

Therefore, defendants' motion is granted.

#### Motion for Preliminary Injunction

The trial of this action was scheduled to begin on January 31, 2007.

On January 18, 2007, Mr. Krum was quoted in an article in the New York Post entitled "Traders Back Suit, Claim Thain Misled." The article was accompanied by a picture of Mr. Wey in

front of the New York Stock Exchange. The reporter states in the article that he reviewed a document with Mr. Thain's schedule and notes. We now know that document referred to in the article is plaintiff's Exhibit 39, "Floor Member Breakfast Meeting: 8:00 am-Room 630: Tuesday, February 15, 2005," bearing Bates number W000266 or W00002. It is not contradicted that defendants had marked it "confidential" pursuant to this Court's approved confidentiality agreement. At the argument on the motion on January 29, 2007, Mr. Krum admitted his mistake in showing the confidential document to the reporter.

Mr. Thain argues that Mr. Krum violated the disciplinary rules by speaking to the press and giving the reporter a confidential document. DR 7-107, 22 NYCRR 1200.38 provides:

(a) A lawyer participating in or associated with a criminal or civil matter, or associated in a law firm or government agency with a lawyer participating in or associated with a criminal or civil matter, shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in that matter. Notwithstanding the foregoing, a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement so made shall be limited to such information as is necessary to mitigate the recent adverse publicity. (b) A statement ordinarily is likely to prejudice materially an adjudicative proceeding when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to: (1) The character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness.

Defendants argue that disclosure of the document was a violation of the confidentiality agreement executed on February 24, 2006.

Mr. Krum submitted an affidavit in opposition setting forth his pedigree, but not addressing the motion. At argument, he explained on the record that he spoke to the NY Post reporter who had called him after receiving from the New York Stock Exchange by e-mail on January 17, 2007 a copy of the NYSE brief on its motion for summary judgment, which had been served on plaintiff on January 12, 2007, as well as filed in the court. Mr. Krum read to the court his response to the reporter which was: "It is my opinion that when the trial starts in two weeks, the evidence that the plaintiff offers will establish that the head of the New York Stock Exchange refuses to accept responsibility for his actions and continues to cover up his own false statements and misleading half truths."

As a consequence, this Court adjourned the trial of this matter until September 12, 2007 to ensure that the article would not prejudice the parties at trial. The parties were also directed to forego gratuitous remarks to the press, though remarks consistent with DR 7-107 would be allowed.

The remaining question is whether any further steps need be taken to protect this proceeding from the effects of the article or disclosure of a confidential document and whether there has been a violation of the disciplinary rules.

"Trial courts have 'broad power to regulate discovery to prevent abuse' [citation omitted]. 'When the

disclosure process is used to harass or unduly burden a party, a protective order eliminating that abuse is necessary and proper' [citation omitted]. Courts are empowered to limit press and public access to court proceedings to maintain order and decorum and to protect the rights of parties and witnesses."

*In Nicholson v Luce*, NYLJ, Nov. 9, 2006, at 22 (Sup Ct, NY County 2006), the court sanctioned an attorney under DR 7-107 for his statements to the press. The attorney commented on plaintiff's claims and the probative value of a letter disclosed at a deposition. He also disseminated the deposition transcript to the press. The sanction included: (1) enjoining the public disclosure and dissemination of any discovery material that is not required to be filed with the court; (2) enjoining the attorney from further violation of DR 7-107; and (3) imposing the cost of bringing the application for relief from the violative statements and actions, including attorneys' fees.

Here, it appears that the NYSE, not Mr. Thain, sent its summary judgment brief to the NY Post. When the NY Post called Mr. Krum for comment, he did not respond to the brief, but made a gratuitous statement concerning Mr. Thain. Admittedly, Mr. Krum showed a confidential document to the NY Post reporter. It does not appear that a copy of the confidential document was given to the reporter. If it was, then Mr. Krum is directed to retrieve it immediately. Otherwise, there appears to be no need for further action as the delay of the trial and prohibition against further unnecessary statements squarely deals with the problem of influencing the jury pool.

Accordingly, it is

ORDERED that defendants' motion for summary judgment dismissing the complaint as to count two is granted and negligent misrepresentation is dismissed; and it is further

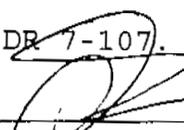
ORDERED, that the motion to dismiss the fraud and breach of fiduciary duty claims is denied except that the motion is held in abeyance as to the *in pari delicto* defense. The parties are instructed to brief the issue within thirty days after service of this order with notice of entry. The parties are to simultaneously exchange briefs solely addressing the *in pari delicto* defense. Replies shall be exchanged thirty days thereafter. The parties shall deliver copies of their briefs to the Court's part clerk, Room 238 and call the part clerk to schedule a mutually agreeable date and time for argument; and it is further

ORDERED, that the claims for breach of fiduciary duty and negligent misrepresentation are dismissed against the NYSE; and it is further

ORDERED, that defendants' motion 03 to limit plaintiff's damages evidence at trial is granted; and it is further

ORDERED, that defendants' motion 05 is granted to the extent that the trial is adjourned to September 12, 2007 and Mr. Krum is directed to retrieve the confidential document from the NY Post reporter if it was given to the reporter. All parties are directed to comply with all disciplinary rules. In particular, the parties shall comply with DR 7-107.

Dated: April 10, 2007

  
**CHARLES E. RAMOS**

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**FILED**

JAPR 16 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.