

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

PART 53

Index Number : 401620/2004

STATE OF NEW YORK

vs

GRASSO RICHARD A

C

Sequence Number : 028

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 028

MOTION CAL. NO. _____

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 _____

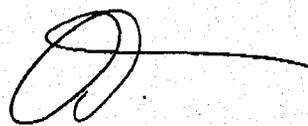
PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with accompanying memorandum decision and order.

Dated: 10/18/06


CHARLES E. RAMOS

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

PEOPLE OF THE STATE OF NEW YORK, by
ELIOT SPITZER, the Attorney General of
the State of New York,

Plaintiff,

Index No. 401620/04

-against-

RICHARD A. GRASSO, KENNETH G. LANGONE,
and THE NEW YORK STOCK EXCHANGE, INC.,

Defendants.

RICHARD A. GRASSO,

Cross-Claim Plaintiff,

-against-

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

Cross-Claim Defendants.

Charles Edward Ramos, J.S.C.:

In motion sequence 28, cross-claim defendants John Reed and the New York Stock Exchange ("NYSE" or the "Exchange") move for an order granting summary judgment dismissing the cross-claims three, four and five asserted by Richard Grasso.

In motion sequence 29, the NYSE moves pursuant to CPLR 3212 to dismiss Mr. Grasso's cross-claims one and three for additional termination benefits arising out of two employment contracts between him and the Exchange.

In motion sequence 30, defendant Kenneth Langone moves pursuant to CPLR 3212 to dismiss the eighth cause of action.

In motions 31,¹ 32 and 33, Mr. Grasso moves for summary

¹He also seeks leave to amend his answer and cross-claim adding the NYSE LLC as an additional third-party defendant. As

judgment dismissing the second, third, sixth and eight causes of action.

In motion sequence 36, plaintiff moves pursuant to CPLR 3212 for an order granting plaintiff partial summary judgment against Mr. Grasso directing him to disgorge funds.

The Complaint

The complaint consists of eight causes of action:

(1) against Mr. Grasso for annual compensation, SERP² and SESP³ benefits, which were unlawful and ultra vires violating the New York Not-for-Profit Law ("N-PCL"). Plaintiff seeks imposition of a constructive trust on and restitution of Mr. Grasso's compensation;

(2) for an unlawful conveyance against Mr. Grasso under N-PCL §§720(a)(2) and 720(b) for knowingly receiving annual compensation and SERP benefits that were not reasonable and unlawful. Plaintiff seeks to set aside the annual compensation and SERP payments;

(3) against Mr. Grasso for breach of fiduciary duty under N-PCL

the papers are silent on this aspect of the motion, the Court is compelled to deny it.

²The NYSE's Supplemental Executive Retirement Plan ("SERP") established in 1984 is a non-qualified pension plan designed to provide NYSE's executives with a reasonable income upon retirement.

³The NYSE's Supplemental Executive Savings Plan ("SESP"), is a non-qualified plan which allows participating NYSE executives to defer portions of their salary on a tax deferred basis to be paid out upon the participants' "termination of employment." SESP § 5. The NYSE makes matching, book entry contributions to participants' SESP account, equal to the first 6% of compensation deferred. SESP §§ 2-4.

- §§717, 720(a) and (b) by accepting unlawful ultra vires payments. Plaintiff seeks a judgment directing Mr. Grasso to account for his official conduct and to make restitution;
- (4) against Mr. Grasso for payment had and received. Plaintiff alleges that Mr. Grasso's compensation and benefits were not reasonable or commensurate with services Mr. Grasso performed and thus constitute unjust enrichment. Plaintiff seeks return of excessive compensation;
- (5) against Mr. Grasso for violation of N-PCL §715(f) because the NYSE Board did not approve his CAP and SERP payments. Plaintiff seeks a declaration that any obligation by the NYSE to make future payments lacking the required N-PCL §715(f) board approval is void and restitution by Mr. Grasso of all CAP and SERP payments;
- (6) against Mr. Grasso under N-PCL §716 for unlawful loans to Mr. Grasso made on May 11, 1995 in the amount of \$6,571,397 and May 3, 1999 in the amount of \$29,928,062;⁴
- (7) against Langone for breach of fiduciary duty under N-PCL §§ 717, 720(a) and (b), by failing to explain Mr. Grasso's proposed compensation. Plaintiff seeks an order directing Langone to account for his official conduct and to make restitution of the unlawful payments to Mr. Grasso; and
- (8) against the NYSE under N-PCL §§202(a)(12) and 515(b) for

⁴The Court's analysis of these motions was frustrated by failure to provide financial statements showing how the SERP and SESP payments were accounted for and what amounts were actually accrued or transferred each year. Likewise, it would have been helpful for the Court to see the Vanguard statements.

payment of compensation and SERP benefits that were not reasonable and ultra vires. Plaintiff seeks a declaration that the NYSE paid Mr. Grasso compensation and SERP benefits that were unlawful and ultra vires. In addition, plaintiff seeks to enjoin the NYSE to adopt and implement safeguards to ensure compliance with the N-PCL.

Background

The background of this action is set forth in this Court's prior decision dated March 15, 2006. Otherwise, relevant background is set forth with regard to each motion discussed below.

Discussion

The independent motions are decided first, followed by the aspects of any motions involving SERP and SESP. The issues arising from SERP and SESP are so intertwined that the Court must make such determinations as are possible, and then apply those determinations to the discrete causes of action.

Reed's and NYSE's Motion Concerning Defamation and Disparagement

Mr. Grasso's Answer consists of five cross-claims.⁵ The first is against the NYSE for breach of §6.2 of the 2003 employment agreement (the "2003 Agreement"). The second cross-claim is for disparagement by the NYSE in breach of §8.9 of the 2003 Agreement. The third cross-claim is against the NYSE for

⁵The amended answer with cross-claims is dated December 16, 2004. His original answer, dated July 20, 2004, was filed in the United States District Court for the Southern District of New York.

breach of §6.2 of the 1999 employment agreement (the "1999 Agreement"). It is pled in the alternative to the first cross-claim provided that the Attorney General is successful in invalidating the 2003 Agreement. The 1999 agreement was executed on May 3, 1999 for a term of June 1, 1999 through May 31, 2005. The fourth cross-claim against the NYSE is for breach of §8.9 of the 1999 Agreement under the same theory. Finally, the fifth cross-claim is for defamation against Reed and the NYSE. This claim arises out of statements made by Mr. Reed to the press and others. As against the NYSE, Mr. Grasso claims these same statements constituted actionable disparagement in violation of the terms of his employment contracts with the NYSE.

Defamation

The motion to dismiss the cross-claim for defamation is granted.

Mr. Grasso was employed by the NYSE from 1968 until 2003. From 1990 until 1995, he was President and Vice Chairman of the Board. From 1995 until 2003, he served as Chairman of the Board and CEO until he was asked to resign amidst controversy. One month before his departure, Mr. Grasso and the NYSE had agreed on the terms of his new employment contract which would extend his term as Chairman and CEO to 2007. The contract also included an immediate lump sum payment to Mr. Grasso in the amount of \$139.5 million.

Approximately three weeks before he departed, the new contract was executed and publicly disclosed. The announcement

was greeted by considerable press attention and comment, most of it (but not all) critical of the level of Mr. Grasso's compensation. *NYSE Chiefs Raise Irking Colleagues, Shocking Politicians*, Miami Herald, Sept. 13, 2003, at 3, Section C; *Criticism of NYSE Chairman Heats Up*, Los Angeles Times, Sept. 13, 2003, at 1, Part C; Letter from Philip Angelides, Treasurer, State of California, Sept. 16, 2003; Statement by New York State Comptroller on the Leadership of the New York Stock Exchange, Sept 16, 2003. Shortly after the announcement, SEC Chairman William Donaldson wrote a letter to the NYSE stating that Mr. Grasso's pay package "raises serious questions regarding the effectiveness of the NYSE's current governance structure" and demanded "full and complete information about the procedures and considerations that governed the award of Mr. Grasso's pay package." Letter from Donaldson to McCall, Sept. 2, 2003.

In its response to the SEC inquiry, Mr. H. Carl McCall, then Chairman of the NYSE Compensation Committee, revealed that Mr. Grasso was also entitled to an additional \$48 million, but that Mr. Grasso had agreed to forego those future payments. At a subsequent press conference attended by both Mr. McCall and Mr. Grasso, Mr. McCall publicly confirmed that Mr. Grasso had agreed to waive the additional \$48 million. Nevertheless, the public controversy continued with regard to the \$139.5 million payment. Various institutional investors and public officials (including two United States Senators) called for Mr. Grasso's resignation. In circumstances discussed in more detail below, on September 17,

2003, Mr. Grasso was asked to resign and did so. Mr. Grasso was followed in the NYSE leadership role by the cross-claim defendant, Mr. Reed.

Mr. Reed retained the law firm of Winston & Strawn to investigate the facts and circumstances surrounding the compensation and benefits paid to Mr. Grasso from 1995 to 2003. The statements which form the basis of the claims for defamation (as well as disparagement) were made concerning the so-called "Webb Report" (the Report), which was the result of the investigation of the circumstances surrounding Mr. Grasso's compensation package at the NYSE. That investigation was conducted by attorneys working under the leadership of Dan Webb. That Report now (informally) bears his name.

The statements regarding the Report and Mr. Grasso made by Mr. Reed upon which the defamation claim is based are as follows:

"if you read this report (referring to the Report) and if you were trained in the law, you would say that there is information in that report that would support a potential legal action,"

"If I were (Mr. Grasso), I'd call me up and say, 'John, let's talk,' and suggesting that Mr. Grasso should 'agree to 'write a check for \$150 million' to end the whole matter"

and

"from a private point of view, it [the Report] certainly would suggest the decision about the money couldn't be justified on its own....In other words, if you thought that if this thing would be reviewed by a new board, and it might not be approved, there is some implication that "Gee, this thing couldn't stand the light of day.'"

Amended Answer of Richard A. Grasso, ¶¶ 271, 272.

These are the only words Mr. Grasso contends were defamatory (or disparaging).

The parties are in agreement that Mr. Grasso is a public figure and as such he may not sue for defamation unless he is able to allege that when Mr. Reed made the statements, he acted with malice. In a defamation action involving a public figure, the proponent has the burden of showing actual malice by clear and convincing evidence. *Freeman v Johnston*, 84 NY2d 52 (1994) cert denied 513 US 1016 (1994). Actual malice is established by proving that the declarant's statement was made with knowledge of falsity or reckless disregard as to truth or falsity. *Sweeney v Prisoners' Legal Servs.*, 84 NY2d 786, 792 (1995).

In the context of this case, evidence of malice would be present if the Report was false and the declarant (Mr. Reed) knew that it was false and thus knowingly repeated false statements, or that Mr. Reed's statements set forth above, so distorted the Report as to make it appear that the Report was critical of Mr. Grasso as CEO of the NYSE when, in fact, it was not critical.

Mr. Grasso does not allege that Mr. Reed believed the Report was false. Rather, Mr. Grasso's position is that Mr. Reed's statements were a distortion of the Report. Mr. Grasso argues that a fair reading of the entire Report would show that the problem with his compensation was caused by failures of the Board of Directors of the NYSE, not wrongdoing by Richard A. Grasso. This Court's analysis assumes for the purposes of this motion only that the statements by Mr. Reed are defamatory and will

therefore concentrate our discussion on the vital missing element of Mr. Grasso's claim, his failure to allege facts that could support a finding of actual malice.⁶

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, 404 (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 NY Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985).

Mr. Grasso's contention of distortion must meet a minimum threshold. A trier of fact cannot be asked to find that Mr. Reed distorted the Report if this Court is unable to find a basis to come to such a conclusion. So long as Mr. Reed's statements are consistent with the Report, no malice can be found.

Mr. Reed contends that his remarks were supported by the Report and that no triable issues of fact remain, that the Report says what it says and that his remarks could not possibly be considered as inconsistent or as a distortion. Mr. Grasso insists that Mr. Reed's statements were not justified in light of the overall tenor of the Report.

Mr. Grasso argues that the Report finds that the process of setting the level of his compensation was flawed, that the Board of Directors of the NYSE failed in their duties, but that the

⁶On appeal, the Appellate Division, First Department, found that Mr. Grasso stated a claim for defamation. *People of the State of New York v Grasso*, 21 AD3d 851 (1st Dept 2005).

Report found no wrongdoing by him. Mr. Reed argues that no credible argument could be made to a jury that his comments were not a reflection of what was in the Report. The competing contentions pass like ships in the night. The parties are speaking to different issues.

After much motion practice regarding the Webb Report, it is finally now before this Court and contrary to Mr. Grasso's contention, an examination of that Report reveals that it was critical of him as well as being critical of the Compensation Committee and the Board of Directors of the NYSE. None of the defendants escaped criticism. It was highly critical of Mr. Grasso's level of compensation as Chairman and CEO of the NYSE (which criticism implicates Mr. Grasso, the Compensation Committee and the Board of Directors) and suggested wrongdoing by him when it speculated that he had played an improper role in setting his own compensation.

The Report states:

During his tenure as Chairman and CEO of the NYSE, Grasso received excessive levels of compensation and benefits, far beyond reasonable levels... For the years 2000 and 2001, Grasso's compensation was grossly excessive, approximately three to four times what was reasonable... The level of benefits that Grasso accumulated during his tenure was excessive by any reasonable standard.

Report at 2,3.

As a result of Grasso having influence both as to the composition of the Nominating Committee and the Board, in Grasso's later years as Chairman-years when his compensation reached very high levels-he had a hand in selecting the Board members who decided his compensation.

Report at 97.

Not only did Grasso have significant input in the selection of Board members throughout his tenure; he also had the unfettered authority to select which Board members served on the Compensation Committee and likewise, to select the Committee Chair. Thus Grasso hand-selected the members of the Committee charged with reviewing and recommending his yearly compensation.... Several members of the Committee during Grasso's tenure had friendships or personal ties or relationships with Grasso, including Charles Bockett, Davis Komansky, Robert Murphy, Ken Langone and Richard Fuld.

Report at 98.

...the decision to allow Grasso to repeatedly "cash out" his pension benefits while he was still employed at the NYSE was, at the very least, highly unusual. Grasso's receipt of repeated payouts of his pension effectively turned his pension into a cash compensation device, which was against standard executive compensation practice.

Report at 111.

Against proper governance practice, Grasso was involved in or connected to the process that determined his own compensation.

He had a strong influence in who was selected as members of the Nominating Committee and the Board, and he personally selected which Board members served on the Compensation Committee. Some directors he selected to serve on the Compensation Committee were those with whom he had or developed friendships or personal relationships. He also selected some of the most prominent CEO's who had large incomes to serve on the Board and the Compensation Committee. All of this at the very least created the potential for conflict of interest and improper influence.

Grasso also determined, in his sole discretion, the "Chairman's Award" component of the annual NYSE performance evaluation process, which the Committee used in part to determine the annual bonus awards for NYSE employees generally as well as to benchmark Grasso's own compensation. Grasso knew that the NYSE performance was an important factor in the Board's consideration of his own compensation, and he increased, over the empirical criteria, the performance award each year, which effectively increased the benchmark for his own compensation.⁷

⁷The report of Johnson Associates, Inc., which is annexed as an exhibit to the Webb Report, states at page 8:

Report at 120.

Mr. Grasso's contention that such the Report is not critical of him and does not support Mr. Reed's statements is itself, unsupported. As such, his contention does not raise any triable issues. It is obvious to the point of certainty that the Report is critical of Mr. Grasso and that his claim, which requires a finding that it was not critical of him, is without merit.⁸ Mr. Reed's statements reflect the Report's simple and obvious conclusions that Mr. Grasso's compensation package was too high. The Court cannot infer malice just because Mr. Reed does not distinguish between the Board's failures and Mr. Grasso's, if any.

Mr. Grasso's claim that Mr. Reed's statements were a distortion does not create a genuine issue of fact. Mr. Grasso must allege facts that could prove with "*convincing clarity*" that the statements made by Mr. Reed were inconsistent with the Report or a distortion of its conclusions. (emphasis added). See *Vasquez v O'Brien*, 85 AD2d 791 (3rd Dept 1981) (citing *Nader v de*

Moreover, it is unusual for a CEO to have the ability to personally set a portion of the performance factor that is used to benchmark his compensation, as Grasso did with his "Chairman's Award." Under the Incentive Compensation Plan, the Chairman's Award constituted 35% of the 100% target performance factor. During Grasso's tenure, the Chairman's Award was always higher on a pro rata basis than the 65% metric portion of the performance factor, which suggests that Grasso may have tilted the scales in his favor.

⁸The Report is not proof of what really took place, only what the investigators concluded.

Toledano, 408 A2d 31, 49 (DC 1981). Mr. Grasso agrees that there must be a distortion. However, he merely states, in conclusory fashion, that there is a distortion, when demonstrably, the statements by Reed were not a distortion. The Report obviously and repeatedly criticizes the level of Mr. Grasso's compensation. The Report goes much further than Mr. Reed by suggesting that Mr. Grasso was setting his own compensation. To deny the critical tenor of the Report would require a flight of fancy this Court cannot take. Thus, this Court cannot put the question of Mr. Reed's alleged distortion of the Report to a trial. The unsupported allegations of distortion Mr. Grasso submits on his claim of malice do not satisfy any conceivable minimum threshold of genuine issues of fact. Therefore, the claim for defamation against Mr. Reed and the NYSE is dismissed.

Disparagement

The claim against the NYSE for disparagement is also dismissed, for similar reasons. The claim of disparagement is based upon the terms of the 1999 and 2003 Agreements. Those contracts require that to assert actionable disparagement, Mr. Grasso must prove that the NYSE, through Mr. Reed, acting with "willful intent" or "vindictively," disparaged Richard Grasso. 1999 Agreement Sec. 8.9(b); 2003 Agreement Sec. 8.9(b). As set forth above, Mr. Reed cannot be proven to have acted with malice. Since he and the NYSE were entitled to rely and comment upon the issues raised in the Report, (N-PCL §717(b) and BCL §717(a)), there can be no finding of willful intent or vindictiveness.

Therefore, the cross-claim against the NYSE for disparagement is dismissed.

NYSE's Motion Concerning Contract Claims for Termination Benefits

The NYSE also moves to dismiss Mr. Grasso's cross-claims arising out of the same two employment contracts between him and the NYSE. Mr. Grasso claims the right to receive additional termination benefits which his contracts provide for in certain situations. Mr. Grasso contends that he is entitled to benefits pursuant to §6.2 of the contracts because he was "involuntarily terminated" (as defined therein). He asserts this claim notwithstanding the fact that he stated that he had voluntarily agreed to waive these future benefits (these benefits are sometimes referred to as the "\$48 million"). At the press conference held on September 9, 2003, with Mr. McCall referred to earlier, following Mr. McCall's remarks, Mr. Grasso stated;

Some will say you waived \$48 million in payments. I'd like to say: Look what I've achieved and how I've been blessed by this Board and the Compensation Committee. I put this behind me. I'm not going to debate the issue of the size, the future payments. I think it's important for this business to get back to business. And that, very simply, is why I have done what I have done.

Transcript of September 9, 2003 Press Conference.

His testimony on his examination before trial explaining this press conference statement was:

...it was part of my overall response to the Donaldson letter that I disclose to the press that there was another \$48 million due to me, and that I had voluntarily agreed to forego the \$48 million.

Grasso Dep. at 2082:16-20; 158: 14-24.

On September 17, 2003, eight days after stating that he had agreed to "forego" these benefits, Mr. Grasso ceased to be employed by the NYSE. Richard Grasso's Response to the Rule 19-a Statement of The New York Stock Exchange, Inc., and John S. Reed in Opposition to Motion for Summary Judgment on Mr. Grasso's Second, Fourth, and Fifth Causes of Action, ¶¶14 and 15. On that date, Mr. Grasso initiated a telephonic Board meeting. Minutes of Board Meeting, Sept. 17, 2003; Grasso Memorandum to NYSE Employees, Sept. 18, 2003; NYSE News Release. At the outset of the meeting, Mr. Grasso read the following statement:

I want to start by saying that I have tried to analyze the current situation from as many perspectives as I can objectively, and while I say this with the deepest reluctance, the best alternative, it seems to me, is that I should submit my resignation at the next Board meeting if you wish me to do so, for the benefit of the Exchange, and to help preserve what we have tried together to build over the last 35 years, and I look forward to supporting the Board of the Exchange in bringing about a smooth transition to a successor management team. I believe this course is in the best interests of both the Exchange and myself.

Prepared Statement of Richard Grasso at Sept. 17, 2003 Board Meeting.

Thereafter, with Mr. Grasso temporarily off the call, the Board commenced an executive session where they voted 13 to 7 in favor of Mr. Grasso's resignation. Minutes of Board Meeting, Sept. 17, 2003; Langone Dep. 1511; Summers Dep. 150. With Mr. Grasso back on the call, Mr. McCall advised Mr. Grasso of the results. *Id.* Mr. Grasso then stated his resignation from his post as NYSE Chairman and CEO. *Id.* On September 18, 2003, Mr. Grasso approved a memorandum from himself to the NYSE employees

which included the following brief statement:

Yesterday evening, I offered to submit my resignation if the Board requested. The Board did so and accepted that resignation.

He now claims that because the Board of the NYSE asked him to submit his resignation, he was effectively involuntarily terminated by the NYSE without cause, which in turn entitles him to termination benefits. He asserts this notwithstanding his prior waiver of \$48 million and his resignation, which if voluntary, would effect a waiver of termination benefits because it does not satisfy the condition of involuntary termination (see below).

This Court will put aside the issue of Mr. Grasso's prior waiver and assume all facts surrounding the act of resignation/termination are as alleged by him. We will focus our discussion on the question of what potential entitlement Mr. Grasso would have under the terms of the contracts given his version of the facts.

Section 6.2 of both contracts between the NYSE and Mr. Grasso provides for termination benefits only upon satisfying certain conditions. The condition at issue here is the written notice of termination.

Section 6.2 of the contracts provides as follows:

Involuntary Termination by the Exchange without Cause or Termination by the Executive for Good Reason. If the Executive is involuntarily terminated by the Exchange without Cause in accordance with Section 5(c) above or the Executive terminates his employment for Good Reason in accordance with Section 5(d) above, [benefits flow].

Sections 5(c) and 5(d) both require "written notice" of termination.

Mr. Grasso contends that he was terminated and did not resign because his resignation was demanded by the Board. Therefore, assuming that Mr. Grasso's resignation was demanded, the dispositive question is, whether Mr. Grasso's alleged "demanded resignation" is sufficient to trigger benefits under the contracts? Grasso's Opposition to NYSE's Motion for Summary Judgment at p. 8.

All parties agree that no written notice of termination was issued to or by either party. Rule 19-a Statement of NYSE on Grasso's Cross-Claims at ¶¶52, 55, 58; Grasso's Opposition to NYSE's Motion at p. 8-9. The NYSE argues that the absence of a written notice is fatal to Mr. Grasso's claim because the additional termination benefits are triggered by a notice which must be in writing. The NYSE also contends that the absence of a writing also confirms that Mr. Grasso did, in fact, resign.

The circumstances of Mr. Grasso's departure from the NYSE are so common that not only has the Appellate Division been heard on this subject (see *Jaffe v Paramount*, 222 AD2d 17 (1st Dept 1996) (discussed below), but the legislature has weighed in with a statute on point: § 15-301(4) of the General Obligations Law provides:

If a written agreement or other written instrument contains a provision for termination or discharge on written notice by one party or either party, the requirement that such notice be in writing cannot be waived except by a writing signed by the party against whom enforcement of the waiver is sought or by his

agent.

The contracts in this case provide, just as the statute anticipates, that termination (which is a defined term) is by death or written notice only. 1999 and 2003 Agreements.

Though harsh, the Court is compelled to hold that without a written notice, no matter the circumstances, Mr. Grasso must fail because a written notice is required by all of the contracts he signed.

Mr. Grasso argues alternatively that the NYSE is estopped from taking that position. This Court has searched the record to find some act or omission by the NYSE that would act as an estoppel. See *Shohfi v Shohfi*, 303 NY 370, 381 (1952). This Court has found none. The only acts that could lead to any estoppel would be the actions of Mr. Grasso himself in agreeing to forego these benefits.

The decision of the Appellate Division, First Department in *Jaffe v Paramount* 222 AD2d 17 (1996), stands as further authority for the dismissal of this claim. In *Jaffe*, the plaintiff, also a corporate executive, was in a much more sympathetic plight than Mr. Grasso. In that case, the plaintiff had been told he was fired but because the defendant delayed giving him the required written termination notice at that time, his options benefits became worthless. The Appellate Division held that the requirement of a written notice of termination could not be waived [citing GOL §15-301(4)], and that the plaintiff had failed to exercise rights that he knew he possessed. In *Jaffe*, as here,

the plaintiff could have given a written notice of termination for "Good Reason." See Section 6.2 of 1999 and 2003 Agreements. In this case, Mr. Grasso could have done that or merely declined to tender his resignation, thereby forcing a termination notice from the NYSE. Instead, for reasons best known to him, Mr. Grasso agreed to resign.

This Court finds itself compelled to give meaning to the terms of the contracts and the clear meaning of the statute. Pursuant to the contracts, the statute and appellate precedent, this claim is hereby dismissed. This Court need not address the other grounds offered by the NYSE for dismissal. Therefore, all of the cross-claims are dismissed.

Mr. Grasso's Motion to Dismiss Second and Third Causes of Action

Mr. Grasso seeks to dismiss the second and third causes of action arguing that the recent merger of the NYSE with Archipelago and conversion into a for-profit corporation robs the New York State Attorney General of standing to continue this action. According to Mr. Grasso,

"[a]s part of the business combination, the NYSE was merged first into its own wholly-owned subsidiary, NYSE Merger Corporation Sub Inc., at which moment the NYSE no longer existed as a not-for-profit entity; rather, it only existed as a Delaware for-profit corporation ... This Delaware Corporation was then merged into NYSE LLC, a for-profit New York limited liability company, under the sole ownership of the NYSE Group... The for-profit NYSE LLC is, then the ultimate successor by operation of law to the original not-for-profit NYSE... NYSE LLC, in turn has created two subsidiaries-- NYSE Market, Inc., a for-profit Delaware corporation, and NYSE Regulation, Inc., a New York not-for-profit corporation... (post-merger diagram).

Memorandum in Support of Motion of Richard A. Grasso for Summary

Judgment on Second and Third Cause of action for Lack of Standing, footnote 4 at p. 4.

Mr. Grasso's theory rests on his presumption that the Attorney General's action is like a shareholder's derivative action. Evidencing that this derivative-like action was inappropriately initiated by the Attorney General, Mr. Grasso urges that the Attorney General should not be spending taxpayers' money to pursue a monetary recovery that can only benefit the shareholders of the NYSE-LLC, a for-profit corporation.

In the second and third causes of action, plaintiff seeks relief against Mr. Grasso, as an officer and director of a not-for-profit, for an unlawful conveyance and for breach of fiduciary duty. There is no dispute that plaintiff's authority to bring an action to enforce N-PCL §§ 717 and 720 is set forth in N-PCL §720(b) entitled "Actions on behalf of the corporation" which provides:

(b) An action may be brought for the relief provided in this section and in paragraph (a) of section 719 (Liabilities of directors in certain cases) by the attorney general, by the corporation, or, in the right of the corporation, by any of the following: (1) A director or officer of the corporation. (2) A receiver, trustee in bankruptcy, or judgment creditor thereof. (3) Under section 623 (Members' derivative action brought in the right of the corporation to procure a judgment in its favor), by one or more of the members thereof. (4) If the certificate of incorporation or the by-laws so provide, by any holder of a subvention certificate or any other contributor to the corporation of cash or property of the value of \$ 1,000 or more. (Emphasis added)

A plaintiff suing derivatively on behalf of a corporation typically loses standing to continue pursuing an action following

a merger involving the corporation. *Rubinstein v Catacosinos*, 91 AD2d 445, 446 (1st Dept), aff'd 60 NY2d 890 (1983). This is so because the company on whose behalf the plaintiff is suing no longer exists, and has been replaced by a combined company that the plaintiff no longer has the right to control. For example, plaintiff ceases to be a stockholder because she has tendered the shares for sale or the shares were converted to shares in the new merged corporation. *Id.* See also *Ciullo v Orange and Rockland Utilities*, 271 AD2d 369 (1st Dept 2000), app denied 95 NY2d 760 (1965); *Bronzaft v Caporali*, 162 Misc 2d 281, 286 (Sup Ct, NY County 1994). It is not that the cause of action disappears, but that the complaining shareholder loses standing to sue. Thus a merger does not affect "causes of action against directors and officers for breach of contract or fiduciary duties or in tort, sought to be enforced by the corporation directly." *Platt Corp. v Platt*, 21 AD2d 116, 121 (1st Dept 1964), aff'd, 15 NY2d 705 (1965). Indeed, BCL §906(b)(3) provides:

The surviving or consolidated corporation shall assume and be liable for all the liabilities, obligations and penalties of each of the constituent entities. No liability or obligation due or to become due, claim or demand for any cause existing against any such constituent entity, or any shareholder, member, officer or director thereof, shall be released or impaired by such merger or consolidation. No action or proceeding, whether civil or criminal, then pending by or against any such constituent entity, or any shareholder, member, officer or director thereof, shall abate or be discontinued by such merger or consolidation, but may be enforced, prosecuted, settled or compromised as if such merger or consolidation had not occurred, or such surviving or consolidated corporation may be substituted in such action or special proceeding in place of any constituent entity.

Mr. Grasso maintains this action is derivative because the N-PCL §720 is entitled "Actions on behalf of the corporation." Mr. Grasso also asserts that the Attorney General has admitted in this action that it is derivative because Mr. Schick once stated at argument "the Attorney General, when bringing an action pursuant to N-PCL §720, acts for the benefit of the corporation, as the Attorney General always acts." Transcript of Argument 1/25/05 at 18. Moreover, in an unrelated action before Justice Richter, the Attorney General relied on the fact that he was suing on behalf of a non-profit corporation to benefit from the longer six year statute of limitations. *Spitzer v Schussel*, 7 Misc 3d 171, 175 (Sup Ct, NY County 2005), CPLR 213(7) is available to those suing "on behalf of a corporation against a present or former director [or] officer." In *Schussel*, the Court held that the action was on behalf of a corporation and thus denied a motion to dismiss the action as time barred. *Id.*

In this action the Attorney General is not suing derivatively. A "derivative action" is

"a suit by a beneficiary of a fiduciary to enforce a right belonging to the fiduciary; esp., a suit asserted by a shareholder on the corporation's behalf against a third party (usu. a corporate officer) because of the corporation's failure to take some action against the third party."

Black's Law Dictionary at p. 455 (1990). The Attorney General is not a shareholder of the NYSE and is not the equivalent of a shareholder. Rather, as explained in this Court's March 16, 2006 decision, the interests here represented by the Attorney General are not those of the former members of the NYSE or the current

shareholders of the NYSE LLC. Here, the Attorney General represents the investing community all of which rely on the integrity of the market. The integrity of the market mattered before the action was initiated and it matters now. That interest has not changed with the merger of the NYSE and Archipelago. Although anytime the Attorney General brings an action to stop corporate foibles, the immediate beneficiary of that enforcement action is going to be the shareholders of the corporation involved, the public also benefits. See e.g. Office of the New York State Attorney General Eliot Spitzer, "State Investigation Reveals Mutual Fund Fraud," press release, Sept. 3, 2003 (\$30 million restitution to hedge fund investors of illegal profits from late trading and market timing). Therefore, Mr. Grasso's contention that only the shareholders of the NYSE LLC benefit from this action is myopic.⁹ The investing public benefits as well.¹⁰

Suing for the benefit of the corporation does not make the Attorney General's action derivative. As a matter of statutory construction, N-PCL §720 states that an action may be brought "by the attorney general... or in the right of the corporation, by

⁹It is not a foregone conclusion that damages, if any, will go to the shareholders of the NYSE LLC. Rather, the Court may determine at a later time that damages, if any, would be paid to NYSE Regulation or to the State or some other appropriate entity.

¹⁰In the complaint the Attorney General alleges that Mr. Grasso increased member fees to fund his unreasonable salary. Complaint ¶34. If true, then those increased fees would have been passed on to the investing public in the form of higher fees.

any of the following...[the attorney general is not listed here]." Moreover, the heading of the statutory provision is not controlling. *Squadrito v Griebisch*, 1 NY2d 471, 506 (1956); *People v O'Neil*, 280 AD 145, 146 (3d Dept 1952) (citing McKinney's cons. Laws of NY, Book 1, Statutes §123). Indeed, the legislative history of N-PCL §720 also supports the conclusion that the Attorney General's authority is not derivative. It states:

Action to enforce the duty of care and liability of directors and officers may be brought by the Attorney-General as well as by the corporation, and -- in the right of the corporation -- by a director, a receiver, a trustee in bankruptcy, a judgment creditor, a member, or if the certificate of incorporation or the by-laws so provide, by a holder of a subvention certificate or any other contributor to the corporation of cash or property of the value of \$1000 or more.

Explanatory Memoranda on Not-for-Profit Corporation Law prepared by the Joint Legislative Committee to Study Revision of Corporation Laws, dated January 13, 1969.

Clearly, the corporation would not be suing derivatively, and the Attorney General is listed with the corporation and not the other potential plaintiffs who may bring an action "in the right of the corporation." N-PCL § 720. By distinguishing between the two groups, the Attorney General and corporation on one hand, and the other entities on the other, this Court concludes that the legislature did not intend for the Attorney General's action to be derivative but direct, just as if the corporation itself had sued. The Attorney General and the People of the State of New York are the real parties in interest here, as this Court has consistently held. The NYSE, the People of the

State of New York, and investors who trade on the NYSE are the beneficiaries.

The decision in *Spitzer v Schussel* is not contrary.¹¹ Rather, Justice Richter held that the Attorney General was entitled to the benefit of a six-year statute of limitations because he sued on behalf of the corporation.

Finally, the N-PCL clearly provides that where a New York not-for-profit corporation merges with a foreign or domestic for-profit corporation, any actions against the corporation or its directors or officers continues "as if the merger or consolidation had not occurred." N-PCL §905(b)(3). Likewise, N-PCL §908(h) and BCL §906(b)(3) provide for continuation of actions against successor corporations where a New York not-for-profit combines with a for-profit entity. Relying on BCL §906(b)(3), Mr. Grasso argues that it "was clearly meant to allow the survival of a cause of action by or against the corporation," implying that an action against directors and officers does not survive. However, BCL §906(b)(3) provides: "No action or proceeding, whether civil or criminal, then pending by or against any such constituent entity, or any shareholder, member, officer or director thereof, shall abate or be discontinued by such

¹¹Even if *Schussel* could be characterized as a derivative action, there is one significant difference between *Schussel* and this action. In *Schussel*, the caption reads: Eliot Spitzer, Attorney General of the State of New York, on behalf of the ultimate charitable beneficiaries, and derivatively on behalf of the New Dance Group Studio Inc. Here, the caption reads: People of the State of New York by Eliot Spitzer, the Attorney General of the State of New York.

merger or consolidation..." The Court rejects Mr. Grasso's tortured reading of this statute. The statute is clear that actions against the corporation or its officers or directors may proceed after merger or consolidation.

Therefore, Mr. Grasso's motion to dismiss the second or third causes of action is denied.

Mr. Grasso's Motion to Dismiss the Eighth Cause of Action

The eighth cause of action is against the NYSE under N-PCL §§202(a)(12) and 515(b) for compensation payments to Mr. Grasso and SERP benefits that were not reasonable and ultra vires. The remedy plaintiff seeks is a declaration to that effect. In addition, plaintiff seeks to enjoin the NYSE to adopt and implement safeguards to ensure compliance with the N-PCL.

Mr. Grasso moves for dismissal of this claim, arguing that it is moot since the NYSE merged with Archipelago Holdings Inc. on March 7, 2006, and contending that the N-PCL no longer governs the NYSE. Although Mr. Grasso is not a party to the eighth cause of action, the Court is compelled to address Mr. Grasso's argument as it attacks the Court's jurisdiction over the eighth cause of action. See *In Re Grand Jury Subpoenas for Locals 17, 135, 257 & 608*, 72 NY2d 307, 311 (1988) ("[M]ootness is a doctrine related to subject matter jurisdiction and thus must be considered by the court sua sponte."), cert denied, 488 US 966 (1988).

Mr. Grasso contends that plaintiff's request for injunctive and declaratory relief is predicated upon the continuing

application of the N-PCL. There is no dispute that the N-PCL does not apply to NYSE-LLC, the successor to the NYSE. Plaintiff suggests that "NYSE Regulation,"¹² a new entity created by the merger, remains subject to the N-PCL. However, NYSE Regulation is not a party to this action as plaintiff never joined NYSE Regulation. Accordingly, the Court must agree with Mr. Grasso about the unavailability of the prospective relief requested. The Court cannot enjoin the NYSE, now a for-profit corporation, to implement safeguards to ensure compliance with the N-PCL.

As to declaratory relief, however, the Court disagrees with Mr. Grasso. CPLR 3001 provides authority for the Court to issue a declaratory judgment. It states:

The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds.

Mr. Grasso contends that there is no jural relationship between

¹²The NYSE and NYSE Arca, Inc. are self-regulatory organizations, or SROs. As such, the NYSE and NYSE Arca, Inc. are responsible for examining compliance with and enforcing the financial, operational and sale-practice rules and codes of conduct for members, member organizations and their employees, and have responsibility for regulatory review of their trading activities. In addition, the NYSE and NYSE Arca, Inc. are responsible for enforcing compliance with their respective listing standards and corporate governance requirements by listed companies. The regulatory functions of the NYSE and NYSE Arca Inc. are conducted by NYSE Regulation, Inc., a separate not-for-profit subsidiary of NYSE Group. NYSE Regulation consists of the following five divisions and a risk assessment unit, employing approximately 745 people as of February 28, 2006: Listed company compliance; member firm Regulation; Market Surveillance; Enforcement and Dispute Resolution/Arbitration." NYSE Group, Inc., S-1/A filed on 5/4/06 at p. 143.

the NYSE and the New York State Attorney General. According to Mr. Grasso, the only relationship between them arose from N-PCL §112 which provides:

(a) The attorney-general may maintain an action or special proceeding:

(1) To annul the corporate existence or dissolve a corporation that has acted beyond its capacity or power or to restrain it from carrying on unauthorized activities;

(2) To annul the corporate existence or dissolve any corporation that has not been duly formed;

(3) To restrain any person or persons from acting as a domestic or foreign corporation within this state without being duly incorporated or from exercising in this state any corporate rights, privileges or franchises not granted to them by the law of the state;

(4) To procure a judgment removing a director of a corporation for cause under section 706 (Removal of directors);

(5) To dissolve a corporation under article 11 (Judicial dissolution);

(6) To restrain a foreign corporation or to annul its authority to carry on activities in this state under section 1303 (Violations).

(7) To enforce any right given under this chapter to members, a director or an officer of a Type B or Type C corporation. The attorney-general shall have the same status as such members, director or officer.

(8) To compel the directors and officers, or any of them, of a Type B or Type C corporation which has been dissolved under section 1011 (Dissolution for failure to file certificate of type of Not-for-Profit Corporation Law under section 113) to account for the assets of the dissolved corporation.

(9) Upon application, ex parte, for an order to the supreme court at a special term held within the judicial district where the office of the corporation is located, and if the court so orders, to enforce any right given under this chapter to members, a director

or an officer of a Type A corporation. For such purpose, the attorney-general shall have the same status as such members, director or officer.

Similarly, Mr. Grasso contends that there is no actual controversy between the Attorney General and the NYSE with regard to the substance of the requested declaration. Indeed, the NYSE concedes in its answer that the eighth cause of action "against the NYSE is barred because the conduct upon which it is based was ultra vires and the NYSE is therefore not liable." Fifth Defense, p. 55.

This entire case rises and falls on the issue of whether the NYSE acted ultra vires in awarding Mr. Grasso excessive compensation and benefits. That is precisely the declaration sought by plaintiff in the eighth cause of action. If so, then who was responsible for the ultra vires act? Implicit in the NYSE's defense is that its rogue CEO or director(s) hijacked the NYSE and siphoned off the NYSE's funds and paid them to Mr. Grasso. If Mr. Grasso is responsible for the ultra vires act, as the NYSE's Fifth Defense suggests, then Mr. Grasso may be liable for return of the excessive compensation and benefits paid. If the NYSE acted ultra vires and Mr. Langone is implicated in the ultra vires act, then he may be jointly and severally liable for the excessive amount paid to Mr. Grasso, if any.¹³ If the NYSE did not act ultra vires in awarding compensation and benefits to Mr. Grasso, this case is over. The NYSE could not be any more

¹³A trial must be held on the ultimate issue of whether Mr Grasso's compensation was unreasonable.

interested in this outcome. Since the court will not render a declaration in the absence of parties who are interested in the declaration sought, the Court could not and will not proceed without the NYSE as Mr. Grasso invites us to do. See, *United Services Auto. Asso. v Graham*, 21 AD2d 657 (1st Dept 1964); *Gilligan v Cunningham*, 273 AD 1046, 1047 (3d Dept 1948).

Finally, in the interest of justice and equity, Mr. Grasso contends that the Court should not exercise its discretionary authority to grant declaratory relief. Rather, Mr. Grasso argues that the NYSE's presence in the action will confuse the jury and prejudice him. According to Mr. Grasso, the NYSE has no incentive to litigate against the declaration sought by plaintiff and this absence of adversity will confuse the jury. Until the Appellate Division rules otherwise, as a jury will not be deciding the issue, Mr. Grasso is safe from jury confusion. See this Court's decision dated Aug. 10, 2006. Moreover, Mr. Grasso's argument skips over the related question of who is responsible for the ultra vires act, if any. Langone is certainly adverse and expected to litigate. Therefore, the eighth cause of action is sustained to the extent that it seeks declaratory relief. Plaintiff's request for injunctive relief against the NYSE is dismissed.

Remainder of Mr. Grasso's Motion and Attorney General's Motion to Dismiss

This leaves Mr. Grasso's motion to dismiss the sixth cause of action and the Attorney General's motion for summary judgment on all of his claims as to liability. Both motions arise from

the SESP and SERP transactions.

In 1995 and 1999, respectively, Mr. Grasso was paid \$6.6 million (the "SERP Payment") and \$29.9 million was transferred from SERP to his SESP account (the "SERP Transfer"). On September 3, 2003, Mr. Grasso was paid \$87,911,894 from his SESP account (the "SESP Payment").

In motion designated 036, plaintiff moves pursuant to CPLR 3212 for an order granting partial summary judgment against Mr. Grasso directing him to disgorge funds he received under (1) NYSE SERP that were not approved or reviewed by the NYSE Board; and (2) under the SESP that violated the SESP's prohibition against in-service distributions prior to the executive's termination from employment. He argues that there is no issue of fact that the two SERP transactions and SESP Payment violate common law and the N-PCL. The Attorney General seeks return of the \$36.5 million and interest and the \$87 million SESP Payment to Mr. Grasso allegedly made in violation of the SESP agreement.¹⁴ Plaintiff also seeks interest on two interest free loans made to Mr. Grasso in violation of N-PCL §716. Plaintiff states that its motion is for liability on all six causes of action.¹⁵

¹⁴Without the financial records it is impossible to know what is included in the \$87 million, but it is clear that it includes the \$29.9 million SERP Transfer. The Court will treat the \$29.9 million as SERP as that is where it originated. This brings the actual SESP amount at issue here to \$58 million.

¹⁵The Court disagrees with the Attorney General's construction of the relief from this motion. If a payment to Mr. Grasso is found violative, it must be returned. Whatever is left is the amount on which the court will hold a trial as to whether it is "reasonable" compensation.

SESP

Grasso maintains that prior to the filing of its summary judgment motion, the Attorney General never advanced the argument that SESP distributions made to Grasso were improper, and the Complaint makes no mention of SESP at all. Further, Grasso contends that because the propriety of the SESP distributions were not mentioned in the complaint, few witnesses were questioned about it. Grasso's Opposition at p. 19.

The court rejects Grasso's contention. The complaint contains numerous allegations referencing the improper distribution to Grasso of SESP funds, identified by the Attorney General interchangeably as "deferred compensation" and "SESP." The Complaint states the \$139.5 million in excessive compensation paid to Grasso under the 2003 Agreement was, in part, "comprised of deferred compensation . . ." Complaint, ¶¶ 15, 32, 105, 112, 132. Additionally, the Complaint references Grasso's participation in the SESP plan itself, which is identified as one aspect of Grasso's compensation and benefits he received while employed at the NYSE. Id. ¶¶ 50-51, 81. Further, the Complaint alleges the improper transfer of SESP funds. Id. ¶¶ 70, 81, 93, 94, 96, 98. The causes of action pray relief against Grasso for the unreasonableness of "compensation," "benefits," and "payments" he received, which clearly include deferred compensation and transfer of SESP funds. Id. ¶¶ 167, 188, 194, 216. As discussed above, the *raison d'être* of the SESP plan is the establishment of a fund comprised of a participant's deferred

compensation.

The court detects no prejudice to Grasso stemming from the Attorney General's use of the term "deferred compensation" interchangeably to refer to SESP funds in the Complaint. Numerous witnesses, in addition to Grasso himself, were questioned about all aspects of Grasso's SESP participation, and opined about the propriety of a pre-termination of employment distribution to a SESP participant. Bernstein Depo., 466-468, 170:24-25, 171:2-3; Levin, I. Depo., 464-465; Ashen Depo., 2533-2534:18-22:18-22; 2536: 19-20, 2538; Mischell Depo., 738-740:22-23, 741:12-15, 742:10-17; Desmond Depo., 109-10; Grasso Depo., 563:11-25, 564:2-21; Karmazin Depo., 597:6-25, 598:2-10.

Finally, a tremendous amount of discovery has been exchanged since the Complaint was filed in May of 2004, which undoubtedly facilitated a more precise identification of the origin of funds distributed to Grasso during the term of his employment at the NYSE. Accordingly, Grasso's contention that the Court should not address the propriety of the SESP distributions alleged by the Attorney General is meritless.

On March 30, 1999, Mr. Grasso executed a payment election form in conjunction with his SESP account, which stated that he requested to receive distributions from his SESP account in a lump sum, the January 1 following the termination of his employment. NYSE SESP Payment Election Form, March 30, 1999. The form provides that if his employment ends prior to the

operativeness of his election, then he was to receive the proceeds of his SESP account either "as indicated in a prior election form" or "as provided by the plan, if no prior election was made." *Id.*¹⁶

While SESP funds are to be distributed upon a participant's termination of employment only (SESP §5), the plan allows for distributions prior to a participant's termination of employment in the event of certain types of participant hardship, such as the need to pay for medical care. SESP §6 [a]. Determination as to hardship is in the sole discretion of the Compensation Committee.

It is neither disputed nor even alleged, that Mr. Grasso qualified or attempted to qualify for a hardship, pre-termination withdrawal from his SESP account. In order to attempt to qualify for a hardship withdrawal, the SESP requires the participant to first provide documentation to the Compensation Committee establishing that a "reasonable financial need for the withdrawal" exists, which is followed by a decision of the Compensation Committee. SESP §6 [a], [c].

Mr. Grasso himself stated in the course of his deposition that he did not qualify for any of the hardship exceptions.

¹⁶He signed other similar forms. On June 30, 1999, Mr. Grasso deferred 100% of his LTI award for the January 1, 1998 to December 31, 2000 period. It was to be paid to him in a lump sum as soon as possible following the January 1 following his termination. On December 20, 1999, Mr. Grasso deferred 40% of his 2000 ICP award to be paid as soon as possible following the January 1 after his employment ends. The legend at the bottom of each election form states: "This election is subject to the terms and conditions of the Plan."

Grasso Depo. 563:11-25, 564: 2-21. Further, Mr. Ashen testified that he did not think Mr. Grasso qualified for any of the hardship scenarios. Ashen Depo., 2536:7-8.¹⁷ Another Board member, Mr. Karmazin, testified that to his knowledge, no Board members were ever made aware that Mr. Grasso qualified for hardship withdrawals. Karmazin Depo. 597:6-25, 598:2-10. Mr. Mischell¹⁸ additionally testified that Mr. Grasso would not qualify for a financial hardship withdrawal from SESP. Mischell Depo., 736:2-4.

As for amendments to the SESP plan itself, the SESP provided that the

"Board (or a duly authorized committee thereof), or a person designated by the Board may, in his sole or its sole and absolute discretion, amend this Plan [the SESP] . . . from time to time and at any time in such manner as he or it deems appropriate or desirable."

SESP §16.

The SESP copy provided to the Court contains three amendments, two made in 1999 and another in 2001. None of these formal amendments address a participants' ability to obtain pre-termination withdrawals from SESP accounts or Mr. Grasso. The attorney who participated in drafting these three amendments testified that he could not recall if he worked on any other amendments to the SESP plan, other than the three formal

¹⁷Mr Ashen served as NYSE director of human resources from 1997 until his retirement in 2003. Complaint ¶11.

¹⁸Mercer served as a consultant to the NYSE since 1985. William Mischell was a principal and partner at Mercer. Complaint ¶14.

amendments. Levin, I. Depo., 25:19-25, 26:2.

Finally, the SESP contains a clause which provides that the plan, in addition to the participants' distribution elections made in connection with the plan, "constitutes the entire agreement between the [e]mployer and the [p]articipants" pertaining to the SESP, and "supersedes any other plan or agreement, whether written or oral," concerning the SESP. SESP §22.

In the summer of 2002, Mr. Grasso began considering the revision and extension of his employment agreement with the NYSE. Frank Ashen's Statement of Facts ¶ 16; Grasso Depo., 940: 19-24, 941. Mr. Grasso proposed that in connection with the revisions to his employment agreement, he wanted to receive a distribution from his SESP account. Id. ¶¶ 20-21; Grasso Depo, 940: 19-24.

Officials from Mercer Human Resources Consulting Inc. considered whether Mr. Grasso's request for a SESP distribution upon the renewal of his employment with the NYSE rather than at termination was permissible. After a conversation with Ms. Bernstein¹⁹ in January of 2003, Mr. Mischell recorded in his notes, Mr. Grasso "wants to take a distribution of his SESP, Can he? What are the implications? . . . The SESP does not allow in service withdrawals. Need to amend the SESP." William Mischell's handwritten notes from conversation with Dale Bernstein, Jan. 28, 2003; Bernstein Depo. 734:10-11. Ms.

¹⁹Ms. Bernstein was Vice President of the NYSE's Human Resources Department.

Bernstein provided deposition testimony that she does not recall having this conversation with Mr. Mischell about SESP prohibitions on pre-termination distributions. Bernstein Depo. 170: 23.

On the eve of a Compensation Committee meeting several months after he recorded these notes, Mr. Mischell sent Mr. Ashen an e-mail alerting him that the Enron report of the NYSE's Joint Committee on Taxation was recommending a "change in the law that would restrict an employee's ability to withdraw deferred compensation before the originally scheduled payment date . . . I suppose there is a chance that a Committee member [or Vedder Price] could raise this issue during Friday's call" (bracketed material appears in original).²⁰ E-mail from William Mischell to Frank Ashen, March 25, 2003. The minutes from the Board and Compensation Committee meetings held subsequently do not reflect any discussion regarding the NYSE's own deferred compensation plan, the SESP, participants' ability to obtain pre-termination distributions, or Mr. Grasso's request to obtain the same. Minutes of Board Meeting, June 5, 2003; Minutes of Compensation Committee Meeting, July 14, 2003; Minutes of Compensation Committee, August 7, 2003; Minutes of Board Meeting August 7, 2003.

In response to questioning at deposition, Mr. Mischell later testified that he initially understood that the SESP did not

²⁰Vedder Price Kaufman & Kammholz is a law firm specializing in executive compensation retained by the NYSE in 2002 to advise the Board on Grasso's contract. Complaint ¶13.

allow any NYSE employees to withdraw money from their SESP accounts prior to their departure from the NYSE other than for certain hardship scenarios, but that Mr. Grasso could obtain early distribution by amendment to Mr. Grasso's employment agreement, the 2003 Agreement. Miscell Depo. 735:14-25, 737:3-18.

The minutes of the meeting of the Compensation Committee held in February and July of 2003 reflect discussions were held on Mr. Grasso's proposal to be paid a portion of his deferred compensation, including the "Special Payment," a portion of his CAP awards and distributions from his SESP account. Minutes of the Compensation Committee Meeting July 14, 2003 and February 8, 2003. No mention is made as to the SESP prohibitions on pre-termination withdrawals or of the need to amend SESP in order to permit pre-termination distributions to Mr. Grasso. Minutes of the Compensation Committee Meeting, Feb. 6, 2003. In the July meeting, the Compensation Committee voted to approve the proposed changes to Mr. Grasso's employment agreement, which include the SESP distributions, and present it to the Board. Minutes of the Compensation Committee Meeting, July 14, 2003. Subsequently, the Board and Compensation Committee met. Materials distributed to Board members in addition to Mr. McCall's speaking points at the meeting again reflect that the SESP distribution to Mr. Grasso was a topic of discussion. "Handouts to Board of Directors August 7, 2003;" speaking Points of H. Carl McCall for the NYSE Board of Directors Meeting, Aug. 7, 2003. Again, however, the

minutes reflect no discussion regarding the SESP prohibitions on pre-termination distributions. Minutes of the Compensation Committee Meeting, Aug. 7, 2003; Minutes of the Board of Directors, Executive Session, Aug. 7, 2003. The Board voted to approve Mr. Grasso's proposed employment agreement at this meeting. Minutes of Board Meeting, August 7, 2003.

Mr. Grasso executed the 2003 Agreement several weeks later, on August 27, 2003. Amongst the significant changes to the agreement from the 1999 Agreement was the addition of a provision which called for the immediate payment "equal to the sum of the amounts credited to [Mr. Grasso] . . . under the SESP . . . the total value of such amounts as of August 12, 2003 was \$74,398,156" to Mr. Grasso. 2003 Agreement § 3.3.

Mr. Mischell later testified that "some could argue" that the 2003 Agreement could be deemed an amendment of the SESP plan, with respect as it applied to Mr. Grasso only (Mischell Depo., 740:22-23, 742:10-17), although he stated that "the better approach would have been to amend the SESP to cross-reference the agreement [2003 Agreement] . . ." Mischell Depo., 741:12-15.

Other Board members and consultants involved in the development of Mr. Grasso's compensation benefits packages and the drafting of his employment agreements testified that the SESP was either never amended to permit for a SESP distribution to Mr. Grasso (Bernstein Depo. 170:24-25, 171:2-3), or that they were unaware that SESP had to be amended in order to allow pre-termination distributions. Ashen Depo. 2534:18-22. Others still

were under the impression that the Board could take action to allow SESP distributions, although formal amendments to SESP were not necessary. Ashen Depo. 2536: 19-20.

Several days after Mr. Grasso's execution of the 2003 Agreement, Ms. Bernstein wrote to the account manager at Vanguard where Mr. Grasso's SESP account was held, authorizing her to "transfer the entire current balance of Richard A. Grasso's Supplemental Executive Savings Plan [SESP] accounts to his [Grasso's] individual account," which she estimated as totaling \$87,911,894 in pre-tax value. Letter from Ms. Dale Bernstein to Maria Zappacosta, The Vanguard Group, Sept. 2, 3003.

The Attorney General asserts that Mr. Grasso improperly proposed and accepted the pre-termination withdrawals from his SESP account, in violation of the SESP's own prohibitions on early distributions, by the inclusion of a provision in the 2003 Agreement which calls for a distribution of Mr. Grasso's SESP account.

In opposition, Mr. Grasso advances two, albeit, inconsistent arguments. First, relying on contractual language, Mr. Grasso maintains that the 2003 Agreement does not actually provide for a SESP distribution at all. Grasso's Opposition at pg. 20. Mr. Grasso additionally maintains that, if the 2003 Agreement did provide for a SESP distribution to Mr. Grasso, the Board's approval of the 2003 Agreement was an effective amendment to the SESP plan to allow for pre-termination withdrawals. Grasso's Response to Plaintiff's 19-A Statement of Undisputed Facts at ¶

47.

Beginning with an interpretation of the SESP plan, this Court determines that upon enrollment in it, Mr. Grasso was bound by its rules, pursuant to the unambiguous language of the SESP plan itself. SESP §2 [b] provides: "the [p]articipant's enrollment application shall evidence the [p]articipant's agreement to the terms of the Plan". Further, Mr. Grasso is bound by the payment election form he executed, which, coupled with the SESP plan itself, constitutes the entire, binding agreement between Mr. Grasso and the NYSE regarding SESP. SESP §22 provides "[t]his Plan, along with the [p]articipants' elections hereunder, constitutes the entire agreement between the Employer and the [p]articipants pertaining to the . . . [SESP] and supersedes any other plan or agreement pertaining to the"

Further, the SESP plan does not permit early distributions of a participant's SESP funds, other than in the event a hardship determination has been made, in the absence of an amendment to the SESP plan by the Board. SESP §6. Thus, in order to obtain a non-hardship, pre-termination of employment distribution from a SESP account for any participant, including Mr. Grasso, the SESP plan must be amended by the Compensation Committee.

Turning now to the parties' differing interpretations of the 2003 Agreement, where a motion for summary judgment presents conflicting interpretations of contractual language, this Court must decide as a matter of law whether the language is ambiguous.

Mellon Bank, N.A. v United Bank Corp. of NY, 31 F 3d 113, 115 (2d Cir 1994). The court makes the determination as to ambiguity with reference to the contract alone. *Burger King Corp. v Horn & Hardart Co.*, 893 F 2d 525, 527 (2d Cir 1990). In the event that the Court determines a contract is unambiguous, then it proceeds to interpret the contract according to its terms. *R/S Assocs. v NY Job Dev. Auth.*, 98 NY2d 29 (2002).

The provision at issue in the 2003 Agreement states, "in lieu of participation in . . . the SESP, the Exchange [NYSE] shall pay to the Executive [Mr. Grasso] . . . a payment equal to the sum of the amounts credited . . . under the SESP." 2003 Agreement § 3.3 (b).

This Court determines that section 3.3, the operative provision of the 2003 Agreement which refers to SESP, is unambiguous and susceptible to only one interpretation: it calls for the NYSE to distribute to Mr. Grasso an amount equal to what is held in his SESP account, but does not call for an actual distribution to Mr. Grasso from his SESP account. Accordingly, section 3.3 (b) of the 2003 Agreement cannot have effected an amendment of SESP in order to permit a pre-termination non-hardship withdrawal to Mr. Grasso, because it does not call for a withdrawal of Mr. Grasso's SESP account.

Based upon this finding as to the interpretation of the 2003 Agreement, the court rejects Mr. Grasso's second argument, which asserts that the Board's approval of the 2003 Agreement amounted to an amendment of SESP. As discussed above, the 2003 Agreement

cannot have amended SESP to effectuate a distribution to Mr. Grasso from his SESP account, because the 2003 Agreement does not call for a SESP distribution at all.

In a letter written by Ms. Bernstein to the SESP account manager at Vanguard, Ms. Bernstein authorizes the transfer of the "entire current balance of Richard A. Grasso's Supplemental Executive Savings Plan [SESP] account," which on September 2, 2003 amounted to \$87,911,894. Mr. Grasso does not rebut that the funds he received were from his SESP account. Grasso's Rule 19-A Statement: Grasso's Motion for summary Judgment Dismissing the sixth cause of action, ¶22.

This Court determines that in the absence of any finding by the Compensation Committee upon the presentation of written documentation that a participant qualifies for a hardship withdrawal pursuant to section 6 of the plan, SESP unequivocally bars a participant from obtaining distributions from a SESP account. SESP §5. Rather, as the plan only provides for pre-termination withdrawals in the event of determinations by the Compensation Committee of hardship, this Court determines non-hardship distributions prior to a participant's termination of employment may be obtained only by amendment to the SESP plan itself by the Board of NYSE. SESP §16 ("the Board may, in ... its sole and absolute discretion, amend this Plan ... from time to time and at any time in such manner as ... it deems appropriate").

This Court finds that an effective amendment to SESP was not

made, thus, the transfer of the entirety of the SESP funds to Mr. Grasso was improper, which leads to a finding of unjust enrichment or ultra vires.

If this Court were to adopt Mr. Grasso's interpretation that it was not actually a SESP distribution made to him on September 2, 2003, then if the withdrawal was not made from the SESP account, the payment could only have come from the NYSE's corporate assets, while the same amount was sitting in his SESP account until his termination. Such a finding would constitute a waste of corporate assets, which constitutes a breach of fiduciary duty.

However, Mr. Grasso is entitled to some of the SESP funds. To the extent that the funds comprise earned deferred compensation, Mr. Grasso is entitled to the funds. To the extent that the funds are comprised of benefits that were not vested, Mr. Grasso must return the funds. The court is unable to determine that amount based upon the insufficient documentation provided. Rather, information is needed documenting the source of the funds in the SESP account, delineating which funds originated from SERP, CAP, Special Award, actual compensation, LTIP, etc. This Court is confident that the parties can agree on the amount of actual earned income deferred.

Therefore, the SESP payment made on September 3, 2003 of \$58 million, to the extent it was not vested and not due to be paid to Mr. Grasso until his termination, constituted either unjust enrichment or a breach of fiduciary duty. In any case,

plaintiff's motion is granted as to liability on the third or fourth causes of action.

SERP

The NYSE's Supplemental Executive Retirement Plan ("SERP") established in 1984 is a non-qualified pension plan designed to provide NYSE's executives with a reasonable income upon retirement. By May 1999, after 31 years of employment at the NYSE, including four years as Chairman and CEO, Mr. Grasso's SERP was valued at \$29.9 million.²¹ 1999 Agreement §3.3(a). From 1999 to 2002, Mr. Grasso's SERP tripled in value to more than \$110 million. The 1995 Agreement provided for an immediate lump sum advance of Mr. Grasso's SERP accumulations to date of \$6,571,397 which would be offset against Mr. Grasso's future SERP distributions. Term Sheet for Grasso Contract Proposal Presented to Compensation Committee on Sept. 23, 2002. Mr. Grasso's 1999 Agreement provided for a transfer to SESP of Mr. Grasso's accumulated SERP benefit of \$29,928,062. Mr. Grasso agreed to an offset from his future SERP payout. 2003 Agreement, Exhibit B, §2.

The sixth claim against Mr. Grasso alleges that the SERP Advance and SERP Transfer made pursuant to the 1999 Agreement amounted to the extension of unlawful, interest-free loans, made in violation of N-PCL §716.

Mr. Grasso moves to dismiss the claim, maintaining that the

²¹In 1995, the SERP was valued at \$6.5 million. 1995 Agreement §1(a).

payments were not loans but benefits authorized by the Board by its approval of the 1995 and 1999 Agreements which provided for the payments. In support, Mr. Grasso submits deposition testimony from witnesses who testify that the payments were not intended to constitute loans to Mr. Grasso and information related to the tax treatment of the payments, which purportedly establish that the payments were reported as income. Additionally, Mr. Grasso challenges the remedy that the Attorney General is pursuing for redress of the claim, maintaining that the only remedy available to the Attorney General under N-PCL § 716 is a proceeding against the directors who authorized the payments, and not the recovery of interest for the benefit of the NYSE, as the Attorney General seeks. Finally, Mr. Grasso maintains that any claim based on the SERP Advance made in 1995 is time-barred by the applicable statute of limitations.

Is the SERP Payment a Loan?

N-PCL § 716 provides that

"[n]o loans . . . shall be made by a corporation to its directors or officers . . . A loan made in violation of this section shall be a violation of the duty to the corporation of the directors or officers authorizing it or participating in it, but the obligation of the borrower with respect to the loan shall not be affected thereby."²²

Thus, the provision provides that acceptance of a loan by an

²²N-PCL § 716 does permit loans made between one type B not-for-profit corporation to another type B not-for profit corporation. At the time the events at issue in this action transpired, the NYSE was a type A not-for-profit corporation. *The People of the State of New York v Richard A. Grasso*, 12 Misc 3d 384, 391 (Sup Ct, NY County 2006, Ramos, J.

officer or director of a not-for-profit corporation constitutes a breach of fiduciary duty.

A loan is a contract whereby one party advances monies to the other upon a promise to repay at a future time a sum equivalent to that which was transferred, with or without interest. *Matter of Druck*, 7 Misc 3d 893, 897-98 (Sur Ct, Kings County 2005), aff'd 2006 NY App Div LEXIS 12293 (2006); *Envirokare Tech, Inc. v Pappas*, 420 F Supp 2d 291, 293 (SDNY 2006); *Wagman v Chater*, 1996 WL 219646, *2 (SDNY 1996). The agreement to repay may be express or implied. *Druck*, at 898; see also Black's Law Dictionary 646 (6th ed 1991) (a loan is defined as "[d]elivery by one party to and receipt by another party of a sum of money upon agreement, express or implied, to repay it with or without interest"). Where the obligation to repay is established, the law regards the transaction as a loan, regardless of form. *In Re Renshaw*, 222 F3d 82, 88 (2d Cir 2000); *Matthiessen v C.I.R.*, 194 F2d 659, 661 (2d Cir 1952); *In re Grand Union Co.*, 219 F 353, 356 (2d Cir 1914); *In re Adelpia Communication Corp.*, 2006 WL 687153, *10 (SDNY 2006). Furthermore, an advance of money constitutes a loan if the extension of the advance carries with it the obligation to repay. *TIFD III-E, Inc. v U.S.*, 459 F3d 220, 238 (2d Cir 2006). Whether a particular transaction constitutes a loan is to be determined by the surrounding facts of the particular case. *The People of the State of New York v Grasso*, 12 Misc 3d 384, 400; *In re Adelpia Communication Corp.*, 2006 WL 687153, *10 (SDNY 2006).

No one factor is dispositive, including the parties' formal designation of the transaction. *In re Adelpia Communication Corp.*, 2006 WL 687153 at *10; *Matthiessen v C.I.R.*, 194 F2d 659, 661 (2d Cir 1952). Generally, several factors should be considered, including the intent of the parties, which is inferable from the language of the contracts, *In re Adelpia Communication Corp.*, 2006 WL 687153 at *10, the presence or absence of interest, *Calcasieu-Marine Nat. Bank of Lake Charles v American Employers' Ins. Co.*, 533 F 2d 290, 297 (5th Cir 1976), cert denied 429 US 922 (1976), and the parties' tax treatment of the payment. See generally, *Ambassador Apartments, Inc. v Commissioner of Internal Revenue*, 406 F 2d 288 (2d Cir 1968). Ultimately, however, where the obligation to repay the amount extended is deduced, the law will regard the transaction as a loan. *Druck*, at 898.

It is well-settled that where the terms of an agreement are clear, complete and unambiguous, the agreement shall be enforced according to its terms. *R/S Assoc. v NY Job Dev. Auth.*, 98 NY2d 29, 32, rearg den, 98 NY2d 693 (2002). Thus, the introduction of extrinsic or parol evidence as to what the parties may have intended but misstated in the agreement is inadmissible. *Id.*

Here, the Court determines that both the amendment and section 7.2 (a) of the 1995 Agreement contain no ambiguities. The 1995 Agreement provides that Mr. Grasso "shall, upon his termination of employment with NYSE, be entitled to receive a pension," which was to be calculated pursuant to equations set

forth in the NYSE's SERP program. According to the 1995 Agreement, Mr. Grasso was entitled to receive this "pension" as a "lump sum benefit" if he voluntarily terminated his employment pursuant to section 4.1, if the NYSE terminated Mr. Grasso's employment "Without Cause" or if Mr. Grasso terminated his employment for "Good Reason" pursuant to section 4.2 (a) of the 1995 Agreement.

Mr. Grasso was not entitled to receive this lump sum benefit, however, if he was terminated "for Cause" by the NYSE, if Mr. Grasso terminated his own employment "other than for Good Reason," as defined under section 4.2 (b) of the 1995 Agreement, or, otherwise, in the absence of "voluntary termination." 1995 Agreement § 7.2(a)(4).

However, the 1995 Agreement was amended to provide for an immediate lump sum advance of the SERP-like "pension benefits" that had accumulated as of the execution of the 1995 Agreement, which totaled \$6,571,397, to be offset against any future "pension benefits"²³ he may be entitled to. *Id.* at § 7.2 [a] ("Such lump sum shall be reduced by the amount of \$6,571,397"). Therefore, instead of receiving these funds as part of his pension at the termination of his employment, Mr. Grasso received an immediate lump sum payment, which would be thereafter deducted

²³While Mr. Grasso opposes the characterization of this lump sum benefit as a "pension," the term itself is used to define the benefit calculable under section 7.2 of the 1995 Agreement. Exhibit 7, Annexed to the Attorney General's Exhibit Binder, at § 7.2(a), "Grasso shall, upon his termination of employment with NYSE, be entitled to receive a *pension* . . . converted to a lump sum").

from the total SERP-like pension benefit that he would have received upon his termination of employment.

Mr. Grasso's entitlement to his SERP-like pension was conditioned upon both the circumstances of his termination and the manner of notice of termination, in the event he terminated his own employment. 1995 Agreement § 7.2(a). Thus, any funds advanced to Mr. Grasso from this SERP-like benefit, including the SERP Advance, was necessarily extended with the unconditional obligation on his part to repay to the NYSE any funds advanced under the SERP-like benefit created under section 7.2 of the 1995 Agreement, in the event that Mr. Grasso was terminated by the NYSE "for Cause," if he terminated his employment "other than for Good Reason," or, otherwise, in the absence of a "voluntary termination" on Mr. Grasso's part, under section 4.1, for failure to comply with the notice of termination provisions of the 1995 Agreement §§ 4.1, 4.2, 7.2 (a).

In the same vein, section §§ 4.1, 4.2 and 7.2 of the 1995 Agreement grant to the NYSE an absolute right to enforce repayment of any advance of SERP-like benefits, including the SERP Advance at issue here, which were taken from the SERP-like pension funds created by the 1995 Agreement. This obligation to repay on Mr. Grasso's part and the right to enforce repayment on the NYSE's part of advances of SERP-like benefits was altered by section 3.3 (b) of the 1999 Agreement and section 3.3 [d] of the 2003 Agreement, only insofar as removing the conditions placed upon his receipt of termination benefits for termination by the

NYSE "with Cause" and if he terminated his employment "without Good Reason." However, the condition entitling him to receipt of the benefits provided he furnish to the NYSE written notice of termination remained unaltered in both the 1999 and 2003 Agreements. 1999 and 2003 Agreements §§ 3.3(b), 5 and 6.

Therefore, by accepting an advance of funds to which he was not absolutely entitled until a later date and implicitly agreeing to repay those funds advanced, Mr. Grasso effectively became a debtor, while the NYSE, having the right to enforce repayment under certain circumstances, was effectively a creditor. Here, the Court has identified an implicit, ongoing contractual obligation on Mr. Grasso's part to repay the amounts he received under the SERP Advance under the conditions set forth in section 7.2 (a), and by the failure to provide notice of voluntary termination or termination for "Good Reason" under section 4.1 and 4.2 of the 1995 Agreement, in addition to subsequent agreements, which leads to the inevitable conclusion that, notwithstanding the formal designation of the funds as merely an advance on future SERP-like benefits, the transaction constituted a de facto loan from the NYSE to Mr. Grasso.

Indeed, documentary evidence establishes that the fixing of interest was considered by the parties. In a letter to the Director of Employee Benefits for the NYSE dated November 18, 1994, Mr. Mischell prepared "a list of advantages to the Exchange [NYSE] of paying Mr. Grasso's accrued lump sum benefit [SERP Advance] at the end of his current contract." Letter from

William Mischell, Foster Higgins to Albert Ganter, NYSE, Nov. 14, 1994. Mr. Mischell explains that if the SERP Advance is paid to Mr. Grasso without interest, the NYSE "will lose the investment income on that amount. The way to make the 6/1/95 [SERP Advance] payment 'no cost' to the Exchange [NYSE] is to reduce the ultimate payment by the initial payment with interest . . . subtracting interest may be the only way to convince the Board that paying the \$6,264,000 lump sum in 1995 [SERP Advance] will not create an additional cost - lost investment income - for the Exchange." *Id.*

In a handwritten note dated February 3, 1995, approximately three months before the execution of the 1995 Agreement, Mr. Mischell writes, "Grasso was furious about the interest offset in his contract [1995 Agreement] for the \$6 million [SERP Advance] prepayment. More to come" (underline appears in the original). William Mischell, handwritten note, Feb. 2, 1995. However, the decision was made not to charge Mr. Grasso interest on the amount of the SERP Advance. William Mischell, handwritten note, April 4, 1995; 1995 Agreement.

Mr. Grasso submits the tax treatment of the payments as evidence that they are not loans. While certainly an important factor to consider, a party's tax treatment is not conclusive.

Ultimately, however, the Court's identification of an implicit, unconditional and ongoing obligation on Mr. Grasso's part to repay, in addition to creating on the NYSE's part an ongoing and unconditional right to enforce repayment of the

amount Mr. Grasso received in the unambiguous terms of the 1995 Agreement which effectuated the advance created, in addition to the subsequent 1999 and 2003 Agreements, is the feature most cogently distinguishing the transaction as a loan. See *TIFD III-E, Inc.*, 459 F3d at 238. Therefore, the \$6 million 1995 payment was a loan made in violation of N-PCL §716.

Statute of Limitations

The SERP Advance, made in 1995, is not time-barred as Grasso argues. Generally, a six-year limitations period applies to actions such as this, where, although monetary relief is sought on certain claims, the action is ultimately equitable in nature. *State of New York v Rick Schussel*, 7 Misc 3d 171, 173-174 (Sup Ct, NY County 2005, Richter, J.); *Abrams v Arcadipane*, NYLJ, August 25, 1994, at 22, col. 1 (Sup Ct, NY County, Mazzairelli, J.).

As discussed above, the 1995 Agreement implicitly obligated Mr. Grasso to repay the SERP Advance if he was terminated by the NYSE "with Cause," if he terminated his employment "without Good Reason," or if he terminated his employment and failed to provide the requisite written notice of termination prior to June 1, 2000. 1995 Agreement §§ 7.2 [a], 4.1, 4.2 and Amendment to 1995 Agreement. Thus, the 1995 Agreement contemplated that this repayment obligation was to continue until June 1, 2000. As discussed above, this obligation to repay was partially altered to the extent that amendments to subsequent employment agreements executed by Mr. Grasso, the 1999 and 2003 Agreements, changed the

terms and conditions of Mr. Grasso's entitlement to the SERP-like benefits by the removal of the condition that he was entitled to the lump sum benefit unless he was terminated by the NYSE "with Cause" or left "without Good Reason." 1999 and 2003 Agreements 3.3(a). Insofar as the obligation to repay the NYSE was ongoing and continuous until the subsequent 1999 Agreement was executed and which superseded and replaced the 1995 Agreement, the claim is not time-barred. A claim is not time-barred where the duty imposed continues within the limitations period. *Richard A. Rosenblatt & Co., Inc. v Davidge Data Systems Corp.*, 295 AD2d 168, 169 (1st Dept 2002); *Thelma Realty Co v Harvey*, 190 Misc 2d 303, 305 (App Term, 2d Dept 2001).

In any event, there remains an implicit obligation to repay on Mr. Grasso's part which was not altered by the 1999 and 2003 Agreements, insofar as the provision of written notice of termination remains a prerequisite to the collection of the SERP-like benefits under these subsequent agreements. 1999 Agreement § 3.3(d); see also this Court's decision above addressing motion sequence 028. Therefore, the obligation to repay the SERP Advance was ongoing and continuous until Mr. Grasso's departure from the NYSE during the term of the 2003 Agreement. Accordingly, each subsequent employment agreement he executed, in 1999 and 2003, which recreated that repayment obligation anew and, consequently, violated N-PCL § 716, restarted the limitations period. Recurring breaches of duty on the part of fiduciaries give rise to new, independent wrongs which restart

the limitations period with each wrong that causes injury. *NYSA-ILA Medical & Clinical Services Fund v Catucci*, 60 F Supp2d 194, 200 (SDNY 1999). Therefore, Mr. Grasso's motion to dismiss the sixth cause of action to the extent it is based on the 1995 payment as barred by the statute of limitations is rejected.

Accordingly, Mr. Grasso's motion to dismiss the sixth cause of action as to the 1995 payment of \$6.5 million is denied and plaintiff's motion for summary judgment on the same claim is granted.

Is the SERP Transfer a Loan?

In May of 1999, Mr. Grasso entered into the 1999 Agreement with the NYSE. Under the 1999 Agreement, several provisions of the 1995 Agreement that entitled Mr. Grasso to certain benefits upon termination of his employment were amended.

First, as discussed above, the 1999 Agreement provided that in lieu of receiving the SERP-like retirement benefit under section 7.2 (a) of the 1995 Agreement which entitled Mr. Grasso to a "lump sum benefit" upon his "termination of employment" unless he was terminated by the NYSE "with Cause" or left "without Good Reason," \$29,928,062 would be immediately transferred to a SESP account in his name. 1999 Agreement § 3.3 (a). The SERP Transfer was comprised of the SERP-like benefit funds that had accumulated to date under section 7.2 (a) of the 1995 Agreement. *Id.* According to the Webb Report, this transfer had the effect of transforming a book entry into cash. Webb Report, p. 8.

In lieu of the entitlement to receive a SERP-like retirement benefit pursuant to the 1995 Agreement and in addition to the SERP Transfer, the 1999 Agreement provided that Mr. Grasso would be entitled to a "lump sum benefit" upon his termination of employment "for any reason." 1999 Agreement § 3.3 [b], Exhibit B. This "lump sum benefit" was to be computed in accordance with an actuarial equation set forth in an exhibit to the 1999 Agreement, minus the amount of the SERP payment and the SERP Transfer. *Id.*

Unlike the obligation to repay the SERP-like retirement benefit imposed upon Mr. Grasso in connection with the extension of the SERP Advance pursuant to section 7.2 (a) of the 1995 Agreement in the event he was terminated by the NYSE "with Cause" or he terminated his employment "without Good Reason," the 1999 Agreement imposed an obligation upon Mr. Grasso to repay for his receipt of the "lump sum benefit" upon termination, only if Mr. Grasso terminated his employment in the absence of providing written notice of termination for any reason. 1999 Agreement §§ 3.3 [b], 5, 6, Exhibit B. As discussed above, there was no written termination notice, thus, Mr. Grasso has an obligation to repay the \$29 million SERP Transfer.

Documentary evidence establishes that this characterization of the SERP Transfer was predicted by Mr. Mischell, who again proposed to Mr. Grasso charging interest to avoid a cost increase to the NYSE. In a letter to Ms. Bernstein dated March 30, 1998, Mr. Mischell writes that in the event that the NYSE decided to

transfer Mr. Grasso's SERP-like lump sum benefits to his SESP account, "to avoid a cost increase [to the NYSE], you may want to offset the ultimate SERP benefit by the amount which is transferred, plus interest on that amount" (underlined material appears in original). Letter from William Mischell to Dale Bernstein, March 30, 1998. It is undisputed that interest was never charged to Mr. Grasso on the SERP Transfer. Therefore, Mr. Grasso's motion to dismiss the sixth cause of action as to the \$29 million SERP Transfer is denied and plaintiff's motion for summary judgment is granted.

The Entitlement to Interest

Mr. Grasso challenges the remedy the Attorney General seeks in the sixth cause of action; interest on the alleged loans. Mr. Grasso maintains that the only statutory remedy for redressing an illegal loan is an action for damages against the directors who authorized it, and citing to N-PCL § 719(a)(5). Mr. Grasso cites to no case law in support of his argument.

As Mr. Grasso is a director or officer participating in the loan made in violation of N-PCL §716, the Attorney General clearly has the authority to bring this action against Mr. Grasso. This Court has already determined that the Attorney General has standing to pursue redress of these claims, pursuant to its *parens patriae* authority. *The People of the State of New York*, 12 Misc 3d at 396; see also *Consumers Union of U.S., Inc. v State of New York, The Charitable Asset Foundation*, 5 NY3d 327, 370-71 [2005], Smith, J. on dissent (the N-PCL authorizes the

Attorney General to enforce duties of care, loyalty and obedience on the part of officers and directors of not-for-profit corporations; the prohibition on loans under N-PCL § 716 is but one aspect of the duty of loyalty, of which the Attorney General is charged with enforcement).

Generally, at common law, the obligation to pay interest on a loan can be recovered only where it is expressly stipulated to by the parties, provided for by statute, or implied-in-fact. *Rosenfeld v Port Authority of New York and New Jersey*, 108 F Supp 2d 156, 160 (EDNY 2000); *New York State Thruway Auth. v Hurd*, 25 NY2d 150, 158 (1969). Where the transaction at issue occurs in the commercial context, it is the commercial nature of the transaction itself which supplies the implication for the provision for interest. See *id.*; *Chemical Bank v Flushing Sav. Bank*, 146 AD2d 473, 479-80 (1st Dept 1989). The reason behind this principle is the recognition that actors in the commercial marketplace generally extend loans with the expectation of reaping a financial return. *Id.*

Interest is the appropriate remedy here. The harm to the NYSE is that it did not have use of money which it would have had use of if the cash was not transferred to Mr. Grasso or to his SESP account. Basically, the accounting entries for expensing pension obligation are: debit "Pension Expense" and credit "Pension Liability." Sidney Davidson, Clyde P. Stickney, Roman L. Weil, *Financial Accounting*, 4th ed. at 501 (1985) (Accounting Principles Board Opinion No. 8 (1966), FASB Statement No. 36

(1980)); SFAS 87 (1985). The accounting entry for funding the pension is: debit pension liability and credit cash. Id. Until the pension is funded, the employer has use of the funds.

Mr. Grasso's acceptance of the SERP Advance and SERP Transfer violated N-PCL § 716 because they constituted de facto loans. As discussed above, the Attorney General's motion as to liability on the SERP Advance and SERP Transfer for violation of N-PCL §716 is granted. Mr. Grasso's motion to dismiss on this basis is denied. Therefore, in addition to returning the SERP Advance and SERP Payment, Mr. Grasso must pay interest on the amount of the loans.

Breach of Fiduciary Duty N-PCL §717

Plaintiff alleges a variety of breaches of fiduciary duty.

With regard to the SERP Advance, the Attorney General advances a simple theory: Mr. Grasso had an obligation to disclose yearly SERP awards; SERP was not disclosed; Mr. Grasso's silence as to the size of his SERP breached his fiduciary duty.

When a fiduciary breaches his fiduciary duty, favoring himself over the interest of the corporation, summary judgment is not only appropriate, but required. *Birnbaum v Birnbaum*, 73 NY2d 461, 462 (summary judgement granted on liability when fiduciary breached duty by failing to disclose payments to wife), rearg den 74 NY2d 843 (1989).

Fiduciary duty actually includes three distinct duties: duty of care, loyalty and obedience.

The duty of care is codified in N-PCL §717 which provides

that directors and officers of not-for-profit corporations "shall discharge the duties of their respective positions in good faith and with the degree of diligence, care and skill which ordinarily prudent [persons] would exercise under similar circumstances in like positions." The Regulatory Role of the Attorney General's Charities Bureau, at 3-4,

<http://www.org.state.ny.us/charities/role.pdf> (July 15, 2003).

It requires that "the trustees, directors and officers of charitable organizations be attentive to the organization's activities and finances and actively oversee the way in which its assets are managed. *Id.* This includes attending and participating in meetings, reading and understanding financial documents, ensuring that funds are properly managed, asking questions and exercising sound judgment." Mr. Grasso allegedly violated his duty of care by misleading the Board as to his compensation and benefits so they could not be attentive to financial matters, oversee how assets are managed or meaningfully participate in meetings.

Next, is the duty of loyalty.

"The common law duty of loyalty requires trustees, directors and officers to pursue the interests and mission of the charitable organization with undivided allegiance. Private interests must not be placed above the charity's interests. The N-PCL addresses certain aspects of this duty. For example, the N-PCL requires directors and officers to act in 'good faith' (N-PCL § 717), contains an absolute prohibition against loans to directors and officers (N-PCL § 716) and contains restrictions on self-dealing transactions (N-PCL § 406 & 715), as does EPTL § 8-1.8."

Id. at 4. The Attorney General alleges that Mr. Grasso favored

his own financial interest over that of the NYSE in violation of his duty of loyalty.

Finally, there is the duty of obedience. It

"includes the obligation of directors and officers to act within the organization's purposes and ensure that the corporation's mission is pursued. There is no explicit reference to the duty of obedience in the N-PCL. However, the duty may be inferred by the limitations imposed upon corporate activities as set forth in the purposes clause of the certificate of incorporation (N-PCL §§ 201, 202 & 402 (a) (2)) and the directors' and officers' obligations as the corporate managers of the not-for-profit organization (N-PCL § 701 & 713)."

Id. at 4. The Attorney General alleges the NYSE acted ultra vires by paying Mr. Grasso unreasonable compensation and benefits. Mr. Grasso allegedly knew the NYSE was acting ultra vires. This was a violation of his duty of obedience.

There is no dispute that Mr. Grasso had a fiduciary duty under N-PCL §717. Rather, the question is whether his duty included disclosure of the magnitude of his SERP benefits. It did. As a fiduciary, Mr. Grasso owed the NYSE "a duty of undivided and undiluted loyalty." *Birnbaum*, 73 NY2d at 466. This loyalty is enforced with "uncompromising rigidity." *Meinhard v Salmon*, 249 NY 458 463-4 (1928). In any transaction between the fiduciary and the beneficiary, the fiduciary is "strictly obligated" to fully disclose all material facts. *Blue Chip Emerald LLC v Allied Partners Inc.*, 299 AD2d 278, 279 (1st Dept 2002). In the absence of integrity and fairness in a transaction between a fiduciary and the beneficiary, it will be set aside or held invalid. *Matter of Gordon v Bialystoker Center*

and *Bikur Cholim*, 45 NY2d 692, 698 (1978).

Compensation and benefits paid to the CEO of any corporation is a matter clearly relating to the fiduciary's relationship with the beneficiary. See generally *In Re Viacom Shareholder Litigation*, 235 NYLJ 126 (Sup Ct, NY County, 2006) (Ramos); *Higgins v NYSE*, 10 Misc 3rd 257 (Sup Ct, NY County, 2005) (Ramos). Here, as a matter of law, the court holds that the SERP, a \$36 million liability in 1999, between the corporation and its CEO, was material. It represented 48% of the NYSE's net income in that year.²⁴ In less than three years, it exceeded \$100 million liability when the amount was finally disclosed.

Mr. Grasso's failure to disclose the amount of the SERP thwarted the Compensation Committee from performing its duty of care and obedience. Year after year, it made decisions to pay him without knowing his true compensation.

Mr. Grasso's first defense is to assert that he had no duty to disclose SERP accumulations because the compensation committee was well aware of it. Mr. Grasso relies on the following discussions:

- February 2001 by compensation committee when it discussed awarding Mr. Grasso a \$5 million ICP and whether it should be eligible for SERP;

²⁴The NYSE's 1999 net income was \$75 million. NY Times, March 17, 2000, section C, at 20, col. 4.

- in April 2001 by compensation committee when it considered whether to eliminate LTIP (which was not calculated as part of SERP) and replace it with ICP which would affect SERP;

- in February 2002 when the compensation committee discussed making a portion of Mr. Grasso's annual compensation ineligible for SERP, but decided to award \$5 million of compensation, making it ineligible for SERP;

- in the Summer 2002 when the compensation committee approached Mr. Grasso about a contract extension;

- in September 2002 and March 2003, when the law firm Vedder Price prepared three reports for the compensation committee's review examining Mr. Grasso's SERP;

The Attorney General counters that the inadvertent knowledge the Board may have achieved that Mr. Grasso relies upon is irrelevant because the SERP balance should have been disclosed by Mr. Grasso, and sooner than February 2001. This Court agrees.

Under the SERP rules, as of 1999, the NYSE had a contingent obligation to pay Mr. Grasso \$36 million upon his termination. It was contingent upon Mr. Grasso completing his service under the contract. This sum was considerable for an entity the size

of the NYSE.²⁵ While there was a slight chance that Mr. Grasso would be terminated for cause and thus never paid the SERP, nevertheless the NYSE had an obligation to accrue for the possibility that it would someday have to pay Mr. Grasso that amount. The motion papers reveal that as of 2002, Mr. Grasso's SERP was valued at \$110 million but only \$51,574,000 had been accrued.²⁶

This Court also rejects Mr. Grasso's argument that the Board could not be briefed about SERP because "it was impossible to know the size of the ultimate benefit because it would depend on unknowns." p. 3 of Defendant Richard A. Grasso's Opposition to Plaintiff's Motion for Partial Summary Judgment. According to Carl McCall, and documents submitted on this motion, accruals were made each year to account for this contingent liability. McCall letter to Donaldson, Sept. 9, 2003 p. 8. In addition, internal documents never revealed to the Board and the Compensation Committee make clear that estimates of SERP benefits were made in anticipation of each February compensation review. Frank Ashen Statement of Facts signed May 22, 2004.

²⁵In 1999, the NYSE's revenue was \$736 million and net income was \$75 million. *Big Board Reports Quarterly Loss*, New York Times, March 17, 2000, Section C, at 20, col 4. "The exchange had a net loss of \$800,000, compared with a profit of \$7.4 million in the period a year earlier." *Id.*

²⁶According to the expert report of W. Bruce Johnson, the NYSE used a "smoothing" technique which delayed recognition of its pension obligations. Report submitted by plaintiff at 3. On September 26, 2006, FASB changed accounting standards so employers must fully recognize pension obligations. FASB News Release, 9/26/06.

Mr. Grasso turns the law of fiduciaries on its head when he maintains that it would have been "improper" for him to advise the Board about his SERP. Not only does nothing preclude Mr. Grasso as CEO from making sure that the Committee had all of the information it needed to make an informed decision, it was his affirmative fiduciary duty. Indeed, the Committee relied upon Mr. Grasso and his staff to prepare the packets of information it needed for each meeting. N-PCL §717(b); BCL §717(a). Who, but Mr. Grasso, would have directed the staff to prepare such information for the Compensation Committee?

Alternatively, Mr. Grasso argues that he did not know whether the Board knew or did not know about his SERP. Mr. Grasso asks how could he know what the Board knew or did not know since he was not present at Board meetings while his compensation was discussed. The Attorney General points to Mr. Grasso's testimony where he admits to reading all Board minutes including those of meeting which he did not attend. Grasso Depo. 110:7-25. Mr. Grasso knew or should have known that his SERP was not mentioned.

This Court must agree with Mr. Grasso that it is impossible for the Court to determine on this motion what Mr. Grasso actually knew about what the Board members knew. But summary judgment is not granted on the basis of his actual knowledge. Mr. Grasso's duty is to be fully informed and to see to it that the Board was fully informed. He failed in this duty.

Finally, Mr. Grasso claims he did not know the actual value

of his SERP benefit until the Fall of 2002, when it reached over \$100 million. Grasso Tr. 1681 to 82. Indeed, many members of the Board testified that they did not know about the SERP and if they did, they did not know what the balance was.

This Court also finds this affirmative defense of neglect to be shocking. That a fiduciary of any institution, profit or not-for-profit, could honestly admit that he was unaware of a liability of over \$100 million, or even over \$36 million, is a clear violation of the duty of care. The fact that it was a liability to an insider (Chairman and CEO) is even more shocking and a clear violation of the duty of loyalty. This Court is not imposing a new corporate standard to review annual benefits assessments, as Mr. Grasso charges. Rather, the Court is acknowledging the fundamental duty of each member of a board to understand the business of the company upon whose board they sit. *Broderick v Marcus*, 152 Misc 413, 417 (Sup Ct, NY County 1934); *People of State of New York v Central Fish Company*, 117 AD 77 (1st Dept, 1907).

As a last resort, Mr. Grasso argues that the SERP payments were legal obligations of the NYSE which he accepted in good faith. "Under New York law, corporate fiduciaries may be held liable for breach of fiduciary duty even for conduct undertaken in good faith and innocent intent." *In re Matter of Happy Time Fashions, Inc.*, 7 BR 665, 670 (Bankr. S.D.N.Y. 1980). "It is well established that directors and officers of a corporation are fiduciaries, and their good faith or innocent motives . . . is

[sic] no defense to liabilities founded upon breaches of fiduciary obligations." *Denton v Hyman* (In re *Hyman*), 320 B.R. 493, 505 (BR SDNY 2005), *affirmed*, 335 BR 32 (SDNY 2005).

Therefore, for all the reasons cited above, this Court grants partial summary judgment as to liability on the third cause of action for Mr. Grasso's breach of fiduciary duty.

Accordingly, it is unnecessary to reach the Attorney General's allegations that the amendments to the 1999 Agreement, including the removal of the conditions upon which Mr. Grasso would be entitled to benefits, was the result of breaches of fiduciary duty on his part. This is not an issue that can be determined on summary judgment. In the event that the court determines at trial that the amendments to the 1999 Agreement which effectuated a transfer of SERP funds to SESP, in addition to removing conditions of forfeiture from Mr. Grasso's receipt of SERP funds, was the product of a breach of fiduciary duty on Mr. Grasso's part, or an ultra vires act on the part of the Board, these provisions would be invalidated and Mr. Grasso would not be entitled to these funds.

Unlawful Transfer

The Attorney General seeks summary judgment on its second cause of action under N-PCL §720(a)(2) for an unlawful transfer of corporate assets. The statute authorizes a corporate transfer or conveyance of corporate assets to be set aside "where the transferee knew of its "unlawfulness." Plaintiff seeks to set aside Mr. Grasso's (1) compensation to the extent that it is

unreasonable and thus unlawful and (2) SERP and SESP benefits to the extent they are unlawful. Plaintiff argues that the payments were unlawful for a whole host of reasons. However, this Court reserves for trial the question of whether Grasso knew they were unlawful.

Money Had and Received and Unjust Enrichment

The Attorney General's theory is that the payments to Mr. Grasso are illegal because they were not properly approved by the Board.

"The theory of an action in quasi contract 'rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another... It is an obligation which the law creates, in the absence of any agreement, when and because the acts of the parties or others have placed in the possession of one person money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it.'"

State v Barclays Bank of New York, N.A., 76 NY2d 533 (1990) (quoting *Miller v Schloss*, 218 NY 400, 407 (1916)). However, the existence of a written contract governing the subject matter precludes recovery in quasi contract. *Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987). Here, there are several contracts governing the payments at issue. As to the SESP payments, the Attorney General relies on the SESP rules for a finding that the payments were made in violation of the rules. Likewise, the Attorney General challenges certain SERP payments as violative based on the SERP rules. To the extent that plaintiff is relying on the conflict between Mr. Grasso's contracts and the SERP and SESP rules, the Court must deny

plaintiff's motion for summary judgment on its unjust enrichment claim.

However, plaintiff's theory is that the agreements to pay SERP and SESP to Mr. Grasso prior to his termination are invalid because the Board did not properly approve the payments. Without a contract or Board authorization, the payments would be unjust enrichment. *Mann v Luke*, 44 NYS2d 202 (Sup Ct, NY County 1943) (noc), aff'd 272 AD19 (1st Dept 1947).

The question is whether the Board properly approved the payments. This is a fact issue which cannot be determined on a motion for summary judgment. The question is not, as Mr. Grasso, argues again, whether he acted in good faith or not.²⁷ While this issue is moot in light of the other determinations made herein as to the SERP and SESP, the Court has identified other payments which were advanced to Mr. Grasso bound with an implicit obligation on his part to repay the funds advanced, depending upon the circumstances of his termination, which includes:

First, the "Special Payment" or "Special Award" of \$5 million. This payment was granted to Mr. Grasso on February 1, 2001, and, according to the terms of the award, was supposed to vest at a future date, transferred to his SESP account, and to be paid to Mr. Grasso on February 1, 2006. Minutes of the Compensation Committee, Feb. 7, 2002; Minutes of the NYSE Board of Directors, Executive Session, Feb. 7, 2002; Handouts to Board

²⁷This argument was rejected in the Court's March 15, 2006 decision and is rejected again for the same reasons.

of Directors, Aug. 7, 2003.

However, like the SERP Advance, the award was not an absolute payment to which Mr. Grasso was immediately entitled to, but, rather, it could be forfeited under certain circumstances of his termination. 2003 Agreement § 3.3. The amendments to the 2003 Agreement accelerated the vesting of the Special Award, providing for the immediate transfer to his SESP account, the entire balance of which was paid to Mr. Grasso on September 2, 2003. Letter from Dale Bernstein to Vanguard, Sept 2, 2003. The 2003 Agreement provided that even in the event that Mr. Grasso was terminated by the NYSE "with cause" or he terminated his employment "without good reason," he was "entitled to receive all accrued obligations under the Agreement. 2003 Agreement § 6.3 [a]. The question is whether this 2003 amendment was valid.

Second, as part of the payment to Mr. Grasso of the entire balance of his SESP account, Mr. Grasso received certain CAP, ICP and LTIP funds, which had been previously transferred to the SESP account. Letter from Frank Ashen to H. Carl McCall, July 1, 2003; Handout to Board of Directors, Aug. 7, 2003; Speaking Points of H. Carl McCall for the NYSE Board of Directors meeting. Aug. 7, 2003; 2003 Agreement §3.3(b); Frank Ashen Statement of Facts, May 22, 2004, ¶¶ 20, 26, 38. As with the SERP Advance and the Special Payment, these funds were forfeitable depending upon the circumstances of Mr. Grasso's termination. 1999 Agreement §4.

Accordingly, a factual basis remains for the claim for money

had and received and unjust enrichment. However, factual issues concerning the Board's approval require a trial. Therefore, the motion for summary judgment on the fourth cause of action for unjust enrichment and money had and received is denied.

Constructive Trust

Plaintiff also moves for summary judgment on its first cause of action for a constructive trust. The elements of a constructive trust are a confidential relationship, a promise, a transfer in reliance on that promise and unjust enrichment. *Moak v Raynor*, 2006 NY Slip Op 2686 (3d Dept 2006). As discussed above, the court is unable to find unjust enrichment on a summary judgment motion. In the absence of this critical element, In re Estate of Cohen, 83 NY2d 148, 154 (1994), rearg den, 83 NY2d 953 (1994) the motion for a constructive trust must be denied. Therefore, plaintiff's motion for summary judgment on the first cause of action is denied and this issue reserved for trial.

Accordingly, it is

ORDERED, that Mr. Reed's and NYSE's motions, 28 and 29, are granted and the cross-claims are dismissed; and it is further

ORDERED, Mr. Grasso's motions 31, 32 and 33 to dismiss are denied except that the eighth cause of action is dismissed to the extent that it seeks injunctive relief as against the NYSE; and it is further

ORDERED, that Mr. Langone's motion to dismiss the eighth cause of action is granted to the extent that it seeks injunctive relief as against the NYSE; and it is further

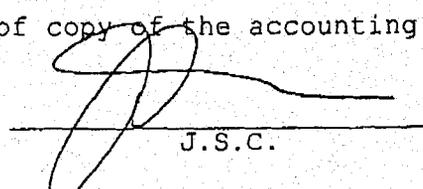
ORDERED, plaintiff's motion for summary judgment is granted as to liability on the third and sixth causes of action, but otherwise denied; and it is further

ORDERED, that an accounting is directed to determine how much interest is owed on prematurely paid SERP Advance \$6 million and SERP Transfer of \$29 million; how much SESP is deferred income actually earned; how much if any contingent SESP was actually earned or vested prior to departure (whatever is left will be the subject of the hearing on reasonable compensation); and it is further

ORDERED, that, within 30 days after service of a copy of this order with notice of entry, plaintiff shall prepare and serve, upon all parties, an accounting, with all appropriate schedules attached; and it is further

ORDERED, that any formal objections to such accounting shall be served within 30 days after service of copy of the accounting.

Dated: October 18, 2006



J.S.C.

CHARLES E. RAMOS

FILED

OCT 19 2006

NEW YORK
COUNTY CLERK'S OFFICE