

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

PRESENT:

~~Charles Edward Ramos~~

PART ~~53~~

Index Number : 600709/2006

HYMAN, JANET

vs

NEW YORK STOCK EXCHANGE

Sequence Number : 002

DISMISS

C

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

is decided in accordance with accompanying memorandum decision and order.

FILED
JAN 10 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/3/2007

[Signature]

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

J.S.C.
HON. CHARLES E. RAMOS

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

-----X
JANET HYMAN, SYLVIA LIEF and
D. PAUL RITTMASER,

Plaintiffs,

Index No. 600709/06
(Consolidated)

-against-

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

Defendants

FILED

JAN 10 2007

COURT OF THE SUPREME COURT OF THE STATE OF NEW YORK
COMMERCIAL DIVISION
CLERK'S OFFICE

Charles Edward Ramos, J.S.C.:

Defendants, the New York Stock Exchange (NYSE) and John A. Thain¹, move pursuant to CPLR 3013, 3016(b), 3211(a)(1), and/or 3211(a)(7), to dismiss plaintiffs Janet Hyman's, Sylvia Lief's and D. Paul Rittmaster's complaints.²

In the (now consolidated) complaints it is alleged that defendants have breached their fiduciary duty to plaintiffs by failing to fully disclose merger negotiations between the NYSE and Archipelago Holdings, Inc.³ (Archipelago), which led to a merger agreement on April 20, 2005⁴. It is also alleged that defendants breached their duty or were negligent in failing to keep the merger negotiations confidential in order to prevent speculative or premature market fluctuations.

¹The Chief Executive Officer of the NYSE.

²Hyman and Lief amended their complaints.

³Archipelago Holdings, Inc. is the operator of the Archipelago Exchange, the first all-electronic stock exchange in the United States.

⁴The United States Security and Exchange Commission approved the merger on February 27, 2006 and the merger closed on March 7, 2006.

Background

Plaintiffs are former members⁵ of the NYSE. In the fall of 2004, NYSE management began to explore options to expand and diversify the NYSE's business. On December 2, 2004, at a meeting with the Board of Directors of the NYSE (the Board), management discussed and received approval from the Board to continue the exploration of such alternatives. Toward the end of 2004, Archipelago asked representatives of the investment banking firm Goldman, Sachs & Co. (Goldman) to contact the NYSE regarding a possible merger between the two companies. On January 5, 2005, such contact was made by Goldman to the NYSE. At a regularly scheduled meeting held on January 6, 2005, the Board was made aware of the alternative of merging with Archipelago. On January 10 and 20 of 2005, the NYSE and Archipelago met to discuss a possible merger.

On February 3, 2005, the Board was advised by management on the status of negotiations with Archipelago. Additionally on that same day, at a "Town Hall" meeting, Thain discussed with members the theoretical possibility of converting the NYSE from a non-profit to a for-profit entity and becoming a public company. He indicated that an advisory committee of NYSE members would be formed to help evaluate the issues. No statement was made about negotiations with Archipelago.

On February 10, 2005, the NYSE and Archipelago entered into

⁵Seatholders on the NYSE are also referred to as "members" of the NYSE.

a confidentiality agreement. Concurrently, the companies also entered into letter agreement with Goldman for assistance in the possible merge along with confidentiality agreements. On February 15, 2005, the NYSE publicly announced the formation of the previously mentioned advisory committee and its purpose. On February 14, 16, and 17, due diligence meetings and telephone conferences were held between the NYSE, Archipelago, their respective outside counsel, and Goldman. Advisory committee meetings also commenced on February 17, 2005.

Plaintiffs sold their memberships, by blind auction, on or about March 1, 2005. On April 20, 2005, the Board unanimously voted to approve and adopt a merger agreement with Archipelago and authorized management to enter into the merger agreement. On that same day, a joint press release was issued announcing the transaction which resulted in the price of NYSE memberships dramatically increasing⁶ throughout 2005.

NYSE member Thomas Caldwell, who was appointed to the advisory committee in February 2005, sponsored⁷, along with his son, the purchase of five memberships between March 1 and April 15, 2005. At least three of these memberships were purchased by people who worked for companies that Caldwell controlled.

Standard on Motion to Dismiss

"Dismissal under CPLR 3211(a)(1) is warranted 'only if the

⁶Approximately an 85% increase. See *Hyman complaint* at ¶36.

⁷In order to purchase a seat on the NYSE, the prospective member must be sponsored by a current member(s) of the exchange.

documentary evidence submitted conclusively established a defense to the asserted claims as a matter of law.'" *Leon v Martinez*, 84 NY2d 83, 88 (1994).

When assessing the adequacy of a complaint on a motion to dismiss pursuant to CPLR 3211(a)(7), a court must afford the pleadings a liberal construction, accept the allegations of the complaint as true, and provide the plaintiff "the benefit of every possible favorable inference." *Id* at 87-88. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss. *Id*. The motion must be denied if from the pleadings' four corners "factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 (2002), quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977).

CPLR 3016(b) requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of, and is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud. *Lanzi v Brooks*, 43 NY2d 778, 780 (1977). In other words, "in determining whether pleadings meet the statutory requirement, appellate courts have subordinated the threshold pleading requirement of 3016(b) to the notice standard of 3013." *Wiener v Lazard Freres & Co.*, 241 AD2d 114, 123 (1st Dept 1998).

CPLR 3013 states "statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."

Discussion

Generally, there is no duty to disclose confidential business negotiations. However, in *Lindner Fund, Inc. v Waldbaum, Inc.* 82 NY2d 219, 223 (1993), the Court of Appeals noted that a special duty to disclose may arise in the case of insider trading, a statute or regulation requiring disclosure, or inaccurate, incomplete, or misleading prior disclosures.

The complaints allege that the disclosures made at the February 3, 2005 "Town Hall" meeting and the February 15, 2005 announcement were misleading and/or incomplete, thereby breaching a fiduciary duty to its members. See e.g. *Hyman Amended Complaint* ¶¶46, 47. Specifically, the complaint alleges that Thain's disclosure to members at the February 3, 2005 meeting "that a conversion of the NYSE from a not-for-profit corporation into a for-profit public corporation was a mere theoretical possibility" was not an encompassing picture. *Id* at ¶19. The plaintiffs allege that there was no mention that Archipelago was a potential candidate for merger or that talks had commenced with this company. Moreover, the plaintiffs allege there was no mention at the meeting that there was any company in such a position.

If the finder of fact should determine that the statements

made were incomplete or otherwise misleading, in accord with *Lindner*, such an allegedly incomplete and/or misleading representation "springs into being" a duty to immediately rectify the disclosure. *Lindner*, 82 NY2d at 223. In addition, the purchases by Caldwell raise the possibility of insider trading that cannot be disposed of on a motion to dismiss. Therefore, the allegation that this representation was incomplete and/or misleading and otherwise constituted a breach of fiduciary duty is viable at this pleadings stage.

Defendants argue that plaintiffs' claims for breach of fiduciary duty should be dismissed against the NYSE because the NYSE itself did not owe a fiduciary duty to its seatholders. Although this is usually the case, an exception applies as noted by this Court in *Higgins v New York Stock Exchange, Inc.*, 10 Misc 3d 257 (NY County, 2005). In *Higgins* [citing *Abrams v Donati*, 66 NY2d 951 (1985) app. denied 67 NY2d 758 (1986)], this Court held that where it is alleged that the breach of duty is owed independent of any duty owed to the corporation, and the breach of duty affects the shareholders disproportionately, direct causes of action against the corporation, as opposed to derivative actions on behalf of the corporation (which in this case would be illogical), may be asserted. *Id* at 264.

Defendants further argue that the protection of the Business Judgment Rule should be applied to the defendants' decision to keep merger negotiations confidential. Usually, this would be the case. However, the presumptive applicability of the Business

Judgment Rule is rebutted by the affirmative statements made at the meeting and judicial inquiry is thereby triggered to determine if a breach of fiduciary duty occurred. *Id* at 278. The Business Judgment Rule is not a license to make misleading or incomplete statements. From the defendants' perspective, not making any statements would have been the effective strategy that would afford protection by way of the Business Judgment Rule. But once the defendants spoke, their statements must be complete and not misleading. Therefore, defendants' motion to dismiss count one is denied.

Alternatively, plaintiffs allege in the second and third causes of action, a breach of fiduciary duty or negligence by defendants for failing to keep the merger negotiations confidential in order to, among other things, prevent speculative or premature market fluctuations. Plaintiffs allege that there was a massive increase in memberships prices between the time of January 11, 2005 and April 20, 2005, in contrast to the overall decline of membership lease prices during the same period. Furthermore, it is alleged that at least Caldwell, and not plaintiffs, was privy to detailed information regarding the NYSE's future organizational structure. These causes of action cannot survive a motion to dismiss. Plaintiff's fail to adequately plead the elements of causation and damages. See *Friedman v Anderson*, 23 AD3d 163 (1st Dept 2005). Indeed, there is no possible causal connection between the alleged leak of confidential information and the plaintiffs' premature sale of

their memberships. Furthermore, the alleged leaks could only have benefitted, and not damaged, the plaintiffs by positively affecting their membership value. Therefore, the second and third causes of action do not support relief cognizable at law, and are thus dismissed.

Accordingly, it is

ORDERED that defendant's motion to dismiss counts one is denied; and it is further;

ORDERED that defendant's motion to dismiss counts two and three is granted.

Dated: January 3, 2006



J.S.C.

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

FILED

JAN 10 2007

NEW YORK
COUNTY CLERK'S OFFICE