UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMIE K.C. SCHER, Plaintiff, vs. NATIONAL ASSOC. of SECURITIES DEALERS, INC. (NASD), et als., Defendants.	CIVIL ACTION NO. 04 CV 6169 MBM

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO APPEAL

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On August 10, 2004 Plaintiff JAMIE K.C. SCHER instituted this action for damages stemming from the wrongful conduct of Defendants in failing to afford Plaintiff her basic Constitutional rights to be free from self incrimination and due process. These Defendants have each, jointly and severally, intentionally, purposefully and with malice aforethought intimidated Plaintiff, misled Plaintiff, and deceived Plaintiff resulting in her becoming severely damaged by their wrongful conduct. Defendants did not file an Answer, but rather a motion to dismiss Plaintiff's Complaint pursuant to FRCP 12(b)(6). The Motion to Dismiss was granted on June 29, 2005 by U.S. District Judge Michael B. Mukasey, resulting in this appeal.

LEGAL ARGUMENT

I. THE TRIAL COURT ERRED IN NOT RECOGNIZING PLAINTIFF'S CONSTITUTIONAL RIGHTS AGAINST SELF INCRIMINATION AND THAT HER RIGHTS TO DUE PROCESS WERE VIOLATED BY DEFENDANTS WHEN THEY "INVITED" HER TO APPEAR FOR AN INTERVIEW, INFORMED HER THAT IT WAS NON-PUBLIC, CONFIDENTIAL, FACT-GATHERING, AND NON-ADVERSARIAL, AND THEN REFERRED HER STATEMENTS OUT FOR CRIMINAL PROSECUTION WITHOUT WARNING.

As can be seen in the deposition transcript, Exhibit "C" pg. 7-8 to the Complaint, Defendant Schwartz represented to Plaintiff,

"...because you are under oath and by Procedural Rule 8210, you are expected to answer all questions truthfully and to the best of your knowledge. Any failure to answer truthfully may be considered conduct inconsistent with high standards of commercial honor and could expose you to possible sanctions which include a bar, suspension, censure and fine. Do you understand that?"

Plaintiff answered in the affirmative. Defendants did not, however, use Plaintiff's testimony for any of their internal proceedings, and she was not "barred, suspended, censured, or fined" by the Defendants as she was warned were the consequences. She was also not afforded the right to be free from self incrimination, a violation of her Fifth Amendment privileges. Defendants, however, for the first time in history, referred Plaintiff's testimony to the New York District Attorneys Office for them to pursue criminal actions against Plaintiff. This was not

contemplated by Plaintiff, for if she knew of the possibility that the matter could escalate to a criminal prosecution, she could have agreed to remain silent, not cooperate with the "internal" investigation and simply tendered her securities licenses back to the NASD. That would have concluded this matter. Plaintiff would have preserved her valuable law license, her profession, and her life, and the within proceedings would not have been commenced.

At the time of Plaintiff's interview, the NASD proceeded under the theory that they were a private actor, not a State actor, and as such was not obligated to provide Plaintiff with a Miranda type warning. This is evident by their warning, "[A]ny failure to answer truthfully may be considered conduct inconsistent with high standards of commercial honor and could expose you to possible sanctions which include a bar, suspension, censure and fine." Before Plaintiff's case, the NASD had never referred a matter to the Prosecutors Office since they were not governmental actors. However, since Plaintiff's case, the NASD has amended their "warning" language to members that are the targets of Rule 8210 hearings. This new warning includes an additional warning which was not in Plaintiff's warnings; "...Additionally, Mr. Mika, you were sworn in under

oath today. Thus, any failure on your part to truthfully answer any questions put before you could expose you to prosecution for perjury under both Federal and New York State perjury statutes." See transcript of Richard Mika annexed to the Complaint as Exhibit "D." As such, Plaintiff was not given the appropriate warning that criminal proceedings could ensue from her cooperation with the Defendants, who themselves believed they were not State actors at the time.

The SEC uses Form 1662 when it requests information from people when conducting an investigation. Form 1662 is entitled "Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission Subpoena." The form provides at paragraph five, *inter alia*, that the request for information, similar to an NASD OTR, could be refused pursuant to the Fifth Amendment's protection against compelled self incrimination. A copy of Form 1662 is annexed to Plaintiff's Complaint as Exhibit "E".

Thus, while the SEC always apprises persons subject to their internal investigations of their Constitutional right to be free from self incrimination, the NASD did not afford the Plaintiff such a right at Plaintiff's interview. As can be seen, the NASD has, since Plaintiff's interview,

taken steps to comply with the SEC directive as enumerated in form 1662.

Plaintiff submits to this court that, while the additional language the NASD subsequently used was an improvement to the Defendant's procedures, the NASD's procedures still fall short of the SEC's well established methods enumerated in SEC Form 1662. The NASD must be held to an equally high standard of conduct when placing people under oath that are facing potentially life altering penalties. The fact that defendants have now modified their procedure by amending their pre-investigation notice requirements to warn of potential criminal sanctions should be indicative of the fact that the procedures previously employed, and specifically with the Plaintiff were insufficient at the time.

II. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S TWELVE COUNT COMPLAINT AS IT STATES A CAUSE OF ACTION FOR VIOLATION OF CONSTITITIONAL RIGHTS, INTENTIONAL, TORTIOUS, AND MALICIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE, AND, *INTER ALIA,* COMPLICITY AMONGST AND BETWEEN THE DEFENDANTS INTENDED TO DEPRIVE PLAINTIFF OF THE FOREGOING RIGHTS.

LEGAL STANDARD

It is well settled that motions to dismiss are viewed with disfavor and are granted sparingly. On a motion to dismiss pursuant to F.R.C.P. 12 (b) (6) the "court is required to accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and to view them in the light most favorable to the non-moving party." *Emcore Corp. v. Pricewaterhouse Coopers L.L.P.,* 102 F.Supp.2d 237, 242 (D.N.J., 2000). Plaintiff's Complaint should not have been dismissed unless it appeared that plaintiff could prove no set of facts in support of her claim that would entitle her to relief. (Per Mr. Justice Marshall with the Chief Justice and one Justice concurring and two Justices concurring in the result). *Jenkins v. McKeithen*, U.S.La.1969, 89 S.Ct. 1843, 395 U.S. 411, 23 L.Ed.2d 404, rehearing denied 90 S.Ct. 35, 396 U.S. 869, 24 L.Ed.2d 123. See, also, *Swanson v. Wabash, Inc.*,

N.D.Ill.1983, 577 F.Supp. 1308; Stubbs v. Kline, D.C.Pa.1978, 463 F.Supp. 110; *Wilkerson v. Mock*, D.C.Pa.1975, 403 F.Supp. 971; *Battle v. Dayton-Hudson Corp.*, D.C.Minn.1975, 399 F.Supp. 900; *Escamilla v. Mosher Steel Co.*, D.C.Tex.1975, 386 F.Supp. 101; *Murphy v. Wheaton*, D.C.Ill.1974, 381 F.Supp. 1252; *Byrd v. Local Union No. 24, Intern. Broth. of Elec. Workers*, D.C.Md.1974, 375 F.Supp. 545; *Aamco Automatic Transmissions, Inc. v. Tayloe*, D.C.Pa.1973, 368 F.Supp. 1283; In re Penn Central Securities Litigation, D.C.Pa.1973, 367 F.Supp. 1158.

A complaint should not be dismissed unless it appears to a certainty that the plaintiff cannot possibly be entitled to relief under any set of facts that could be proven in support of her claim. *Seymour v. Union News Co.*, C.A.7 (Ill.) 1954, 217 F.2d 168 See, also, *Wolman v. Tose*, C.A.Md.1972, 467 F.2d 29, on remand 399 F.Supp. 256; *Keenan v. Looney*, C.A.Okl.1955, 227 F.2d 878; *Lewis v. Brautigam*, C.A.Fla.1955, 227 F.2d 124; *Seymour v. Union News Co.*, C.A.Ill.1954, 217 F.2d 168; *Smith v. Wickline*, D.C.Okl.1975, 396 F.Supp. 555; *Canty v. City of Richmond, Virginia, Police Dept.*, D.C.Va.1974, 383 F.Supp. 1396, affirmed 526 F.2d 587, certiorari denied 96 S.Ct. 802, 423 U.S. 1062, 46 L.Ed.2d 654. If it clearly appears from

complaint that on facts pleaded plaintiff will not be entitled to any relief, a motion to dismiss is proper and should be sustained. *Foshee v. Daoust Const. Co.*, C.A.7 (Ind.) 1950, 185 F.2d 23. However, because the granting of a motion to dismiss is a harsh remedy, it must be cautiously studied, both to effectuate the spirit of the liberal rules of pleading and to protect the interests of justice. *Carlson v. U.S. ex rel. U.S. Postal Service, N.D.Okla.2003*, 248 F.Supp.2d 1040. (Emphasis supplied.)

In ruling on defendants motion to dismiss, the court did not consider whether relief was possible under any set of facts that could be established consistent with the allegations in the complaint, and improperly found that it was beyond doubt that no set of facts would entitle plaintiff to relief. *Tobin v. City of Peoria, Ill.*, C.D.Ill.1996, 939 F.Supp. 628.

It is well settled that a Court may grant a motion to dismiss a complaint only if it appears beyond doubt that plaintiff can prove no set of facts in support of his claims that would entitle him to relief. *Levine v. Kling*, N.D.Ill.1996, 922 F.Supp. 127, affirmed 123 F.3d 580.

The Rule governing motions for judgment on the pleadings requires that district court accept allegations of complaint as true and draw all reasonable inferences in favor of plaintiff, and a motion can be granted only where no relief could be granted under any set of facts that could be proved. *Southmark Prime Plus, L.P. v. Falzone*, D.Del.1991, 776 F.Supp. 888. A District court should grant a motion to dismiss under Rule 12(b) only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations, reading the facts alleged in the compliant in the light most favorable to plaintiff, and accepting those allegations as true. *Berkowitz By Berkowitz v. New York City Bd. of Educ.*, E.D.N.Y.1996, 921 F.Supp. 963.

A Complaint should be dismissed on the pleadings only if it appears beyond a reasonable doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Parnes v. Mast Property Investors, Inc.*, S.D.N.Y.1991, 776 F.Supp. 792.

The question on a motion to dismiss is not whether plaintiffs will ultimately prevail but, rather, whether they prove any sets of facts in support of their claims

that would entitle them to relief. *In re Meridian Securities Litigation*, E.D.Pa.1991, 772 F.Supp. 223.

"Dismissal under this rule is merely a decision on pleadings, and, for that reason, such motions are granted sparingly and with caution..." *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, C.A.4 (N.C.) 1975, 511 F.2d 678, certiorari granted 96 S.Ct. 33, 423 U.S. 820, 46 L.Ed.2d 37, reversed on other grounds 96 S.Ct. 1848, 425 U.S. 738, 48 L.Ed.2d 338.

As Plaintiff has filed a 'well-pleaded' Complaint, the District Court erred in finding that there were no material issues of fact, and, as such, the dismissal of the Complaint was improper.

III. THE TRIAL COURT ERRED BY FINDING THE DEFENDANTS ABSOLUTELY IMMUNE FROM LIABILITY.

The trial court's decision, pg. 11-12 states that "[A]lthough the exchange is private, rather then a governmental entity, immunity doctrines protect private actors when they perform important governmental functions," citing Martens, 190 F.R.D. at 138 (noting that the NASD's "dual public/private status requires caution in reading precedents because a ruling that an exchange is private for a particular purpose does not necessarily mean that it is private for all purposes"). This position by the trial court only bolsters Plaintiff's argument that when the NASD has their "State" actors hat on, a person subject to their internal proceedings are entitled to invoke the Fifth Amendment Right and privilege against self incrimination, and must be warned of the consequences. If the NASD is a "private actor" as concluded by the trial Judge, then they should not be "absolutely immune" from liability. As a matter of public policy it is improper for a private actor to be deemed immune from civil liability. That is, if the NASD is immune from suit as they claim because they are acting in the capacity of, and in furtherance of State relegated or mandated duties, the Plaintiff under the facts

sub judice, is entitled to the Constitutional rights that she was deprived of.

IV. DEFENDANTS ARGUMENT "B" THAT THE NASD IS NOT A STATE ACTOR AND CONSTITUTIONAL PRINCIPLES DO NOT ATTACH TO ITS PROCEEDING SHOULD FAIL.

At first blush it would appear that the issue has been resolved. The NASD, the NYSE --- SROs as a whole --- are not governmental actors but private entities, as Judge Mukasey also concluded. However, in 1998 in *Sparta Surgical Corporation v. National Association of Securities Dealers,* 159 F. 3d 1209, (9th Cir. 1998), the Court of Appeals considered what civil remedies were available against the NASD for wrongfully temporarily delisting and suspending trading in a stock on the opening day of a public offering. The Court found that the SRO was immune from such a lawsuit and affirmed the lower court's dismissal. The Court reasoned that

> **[e]xtending immunity when a self-regulatory organization is exercising quasi-governmental powers is consistent with the structure of the securities market as constructed by Congress.** When Congress considered the burgeoning over-the-counter market in the 1930s, it was confronted with two alternatives: a "pronounced expansions" of the SEC, or a system of industry self-regulation with strong SEC oversight. S. Rep. No. 1455, Fifth Cong., 3d. Sess. 3-4 (1938). Congress chose the latter approach and, with enactment of the Maloney Act, established a system of "cooperative regulation" . . .[citing *1 Loss & Seligman, 6 Securities Regulation* 2787-90 (3d Ed. 1990).

> In 1975, Congress amended the Exchange Act to vest more control in the SEC . . . [S]elf-regulatory organizations "are intended to be subject to the SEC's control and have no governmentally derived authority to act independently of SEC oversight." H.R. Rep NO. 123, 94th Cong., 1st Sess., 48-49 (1975). *[emphasis supplied]*

Sparta appears to have allowed for the existence of so-called quasi-governmental powers. The Court's analysis is somewhat provocative in that it talks about quasi-governmental status and cooperative regulation between the SEC and SROs, and at the same time notes that since 1975 Congress has attempted to solidify the "control" of SROs by the SEC. So in one breath, the Court swept aside the concept of a completely non-governmental, private entity; in another breath the Court (perhaps unwittingly) strengthens the historic "agency" argument by characterizing the SEC as something akin to either a regulatory partner or a control-person of the SROs. But we can all agree that the NASD is not a private business.

On the heels of *Sparta*, the Ninth Circuit considered *Partnership Exchange Securities Company v. National Association of Securities Dealers, Inc. et al.*, 97-16497, CV-96-02792-DLJ (February 25, 1999), a complaint for money damages against the NASD arising from alleged improprieties attendant to the initiation of disciplinary proceedings

against a member firm. In *Partnership Exchange* the Court affirmed a lower court's dismissal on the basis of an SRO's absolute immunity. Following a review of its previous holding in Sparta, the Court reiterated that

> **[T]he NASD was not acting as a private business,** so its actions are protected by absolute immunity from money damages. . . . acts similar to a prosecutor's preparation "for the initiation of judicial proceedings or for trial" are entitled to absolute immunity from suits for money damages. *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993). The NASD's actions fit under that rubric...
> *[emphasis supplied.]*

Within the context of Fifth Amendment compelled-testimony cases, courts seem adamant that SROs are private businesses not amenable to government action --- not even as agents of prosecutors. Within the context of lawsuits for money damages against SROs, the courts seem equally as adamant that those entities are quasi-governmental. So which is it? Are SROs private entities capable of compelling witnesses to waive their Fifth Amendment rights, or are they quasi-governmental entities absolutely immune from lawsuit when acting in such capacity --- or are they both? The Defendants Brief argues that they are both and Judge Mukasey also adopts this position. By this appeal, Plaintiff is respectfully requesting that this Court not countenance that position.

V. IT IS INCONSISTENT FOR THE DEFENDANTS TO ARGUE THAT CONSTITUTIONAL PRINCIPLES DO NOT ATTACH TO ITS PROCEEDINGS WHILE MAINTAINING THE POSITION OF ABSOLUTE IMMUNITY.

It is inconsistent for the defendants to argue that constitutional principles do not attach to its proceedings while maintaining the position of absolute immunity, as they can only be one or the other. That is, if Defendants are absolutely immune from prosecution from suit as a State actor then Constitutional protections apply and Plaintiff could have elected not to testify at the OTR without penalty. Since Plaintiff did not have the option of not testifying at the OTR without penalty, the Defendants should be perceived as private actors that are subject to suit, and were thus not entitled to prosecute Plaintiff criminally based upon the testimony that she was forced to provide at the OTR.

In Point "C" of Defendants Brief, they summarize their argument as follows, "Plaintiff's perjury is not excused by a purported failure to warn her not to lie under oath." However, Plaintiff had no *right to remain silent* without penalty. The specific warning language that the Defendants gave Plaintiff was, "[A]ny failure to answer… truthfully

may be considered conduct inconsistent with high standards of commercial honor and could expose [her] to possible sanctions which include a bar, suspension, censure and fine." See Defendants Brief at pg. 17. It is not so much what Plaintiff *was* warned, the fact remains that Plaintiff was not given the opportunity to remain silent without penalty. The notice the Defendants gave Plaintiff prior to the OTR of the possible sanctions should have been the maximum "penalty" Plaintiff was facing in connection with the testimony she provided. The Defendants exceeded that representation when Defendant Lippman, as detailed in Plaintiff's Complaint, inappropriately provided information to the D.A. from plaintiff's OTR as detailed in the Complaint. As such, Plaintiff was denied her Fifth Amendment rights.

VI. A CLOSE NEXUS EXISTED BETWEEN THE NASD AND THE STATE OF NEW YORK IN REFERRING PLAINTIFF FOR CRIMINAL PROSECUTION SUCH THAT THE NASD WAS ACTING AS A STATE ACTOR.

As alleged in the Complaint, based upon the testimony plaintiff provided at the OTR, defendants commenced internal Regulatory Proceedings as authorized by the NASD procedural rules. However, defendants did not complete their internal regulatory proceeding before improperly requesting that the District Attorney's Office "take-over" the investigation. The defendants never exhausted the administrative remedies as required under SEC Rules and Guidelines. Nor did the defendants conclude that the Plaintiff "lied under oath" before improperly requesting the D.A.'s assistance. The NASD, simply in a concerted effort to obtain an unfair advantage in the Regulatory Proceedings, referred the transcript of Plaintiff's testimony from the internal proceedings to the State prosecutor. There were no conclusory findings by the NASD with regard to the Plaintiff's testimony at the O.T.R., and the premature referral is precisely what Plaintiff's complaint is based upon. As Plaintiff avers in paragraph 50 of the Complaint,

> "50. Often the NASD and the SEC refer matters to the Attorney General or the District Attorneys office for criminal prosecution.

> However, such referrals are made after completion and exhaustion of all internal administrative procedures at the NASD or SEC levels. Prior to the completion of the internal Regulatory Proceedings by the NASDR, defendant Lippman improperly referred the matter to The State of New York for criminal prosecution of the plaintiff, her father and brother, and others based upon, inter alia, the testimony provided by plaintiff at the OTR. This acted as a stay of the internal Regulatory Proceedings, and the New York State District Attorney's Office effectively took over the NASD's "prosecution." However, now it was on a criminal level. Defendants Schwartz, Lippman, Shields and Davis acted as "unofficial extensions" to the DA's office based upon the prior relationship and affiliation Lippman maintained with the prosecutor's office. This activity reaches far beyond that of a self regulating organization as it is now acting in a governmental capacity."

Approximately one year after Plaintiff testified at the "non-public", "confidential", "fact-gathering", "non-adversarial" OTR proceedings, and during the continuing Regulatory Proceedings, defendant Lippman, an in-house NASD staff attorney and a former Asst. District Attorney, began working with the Manhattan, New York District Attorney's Office by improperly sharing information with the intent to get participants in the Regulatory Proceedings to change their "stories" and cooperate with the NASD to avoid criminal penalties themselves. Lippman inappropriately provided information to the D.A. from plaintiff's OTR, causing plaintiff to be indicted and charged with having:

Committed perjury before the NASD at the "nonadversarial, fact finding" OTR, suborning perjury, conspiracy, and scheme to defraud. After a criminal jury trial, based upon information Lippman inappropriately provided to the D.A. from plaintiff's OTR, plaintiff was convicted of perjury and suborning perjury. (The other charges against plaintiff were dismissed.) These facts need to be borne out through discovery proceedings. While no case yet has apparently found a "close" *enough* nexus between the challenged conduct of the NASD and the State, Plaintiff is entitled to a favorable inference as supported by the litany of cases cited *infra* at Point I.

VII. PLAINTIFF'S CONSTITUTIONAL RIGHTS WERE VIOLATED SINCE SHE WAS OBVIOUSLY FACING SUBSTANTIAL PENALTIES IN CONNECTION WITH THE OTR INTERVIEW MANDATED BY THE DEFENDANTS AND SHE HAD NO RIGHT TO BE FREE FROM SELF INCRIMINATION.

The penalty for not appearing at an OTR interview is a fine (generally between $10,000-$20,000) and revocation of all securities licenses held by the person who refused to comply. At the OTR, the main interviewer, defendant Schwartz stated to the plaintiff, for the record, the following: "[A]ny failure to answer or failure to answer truthfully... could expose you to possible sanctions which include a bar [from the securities industry], suspension, censure and fine." Defendants represented to Plaintiff at the time of the interview that "NASDR investigations are non-public and confidential and are fact-gathering in nature. They are not meant to be adversarial proceedings..." There was no notice or warning to plaintiff of the possibility of criminal penalties or referrals in connection with the testimony Plaintiff provided at the OTR. While the Defendants did not warn the Plaintiff that she had to "tell the truth", as they argue in their Brief, Plaintiff was lulled into a false sense of security when she was called down to the NASD offices for an OTR

interview. Defendants led Plaintiff to believe that her Fifth Amendment Rights were not necessary in these proceedings since there could be no criminality stemming from her participation at the interview. Plaintiff was advised that if she failed to cooperate with the defendants, she could be subjected to a fine and revocation of some or all of the securities licenses she held. This was untrue when Defendants made these representations, and the Defendants knew them to be untrue when they made them. Plaintiff alleges the foregoing in her Complaint, and the trial court improperly dismissed the action based upon the pleadings.

VIII. THE DEFENDANTS ARGUMENT THAT THE STATUTE OF LIMITATIONS REGARDING PLAINTIFF'S CONSTITUTIONAL CLAIMS TOLLED BASED UPON 42 USC Sec. 1983 IS MISPLACED.

The jurisdictional basis upon which Plaintiff filed her complaint in this matter is found at paragraph 28 of the complaint. Paragraph 28 avers:

> Jurisdiction is founded upon a Federal question involving the Fifth Amendment Right against self incrimination. This Court has federal question jurisdiction pursuant to 28 U.S.C. §1331 (general federal question jurisdiction), and 28 U.S.C. § 1343 (jurisdiction over civil rights actions).

Thus, defendants argument that 42 USC § 1983 governs these proceedings is misplaced, and their argument that a 3-year statute of limitations bars plaintiff's complaint under 42 USC § 1983 should fail.

IX. THE DEFENDANTS ARGUMENT THAT PLAINTIFF'S NEGILIGENCE CLAIMS ARE TIME BARRED SHOULD FAIL.

Defendant's argument on this point assumes a three year Statute of Limitations and that it has run. Defendant's argument should fail because the statute of limitations could not have begun to run until the negligence was discovered. The negligent acts of the defendants could not have been confirmed until after all the appeals of the plaintiff's criminal conviction were exhausted and penalties against plaintiff were assessed. Plaintiff was denied Certiorari to the Supreme Court of the United States on or about October 12, 2004. Had Plaintiff prevailed on her appeal this case would still exist but the damages may have been somewhat mitigated.

Another argument can be made that the statute of limitations is not three years, but six years. Plaintiff's relationship with the NASD was bound by contract. The NASD's actions amounted to a substantial breach of contract. The NASD was supposed to exhaust all administrative remedies, which they failed to do. The NASD's breach of contract resulted in substantial damages. The six year statute of limitations has not yet run so any of plaintiff's claims that may be considered time barred

under a 3 year limitation can remain viable under a 6 year analysis.

CONCLUSION

As with all of the arguments made by Defendants, the resolution of issues raised by Defendants requires a consideration and resolution of material facts. Without the wrongful conduct of the Defendants as detailed in the Complaint, (which allegations must be considered as true at this stage of the litigation,) the plaintiff would not have suffered the severe and substantial losses she has incurred. The issues are clearly not subject to resolution by a motion to dismiss, or even by motion for summary judgment. Moreover, whether defendants acted with malice as alleged is a question of fact, and should not have been subject to dismissal. The concept of malice is extremely fact sensitive, as a finding must be made as to whether the defendant' conduct was both injurious and transgressive of generally accepted standards of common morality or of law, or whether what was done was right and just under the circumstances. Plaintiff is not aware of the material facts and circumstances surrounding the internal Regulatory Proceedings against plaintiff in connection with the information plaintiff provided at the OTR, nor of the facts

surrounding the referral of her matter to the Attorney General or the District Attorneys office for criminal prosecution. This will require the plaintiff to engage in discovery proceedings. It is well established referral to criminal prosecution is only to be made after completion and exhaustion of all internal administrative procedures at the NASD or SEC levels. That never occurred in this case. Prior to the completion of the internal Regulatory Proceedings by the NASDR, defendant Lippman improperly referred the matter to The State of New York for criminal prosecution of the plaintiff, of this matter. Obviously discovery is needed on these issues and the case should not have been dismissed.

It is also important to remember that the assertion of the Fifth Amendment is a constitutional right deemed so basic to the fabric of our society that the framers of the Constitution included it within the Bill of Rights. Historically, we have viewed efforts to coerce criminal convictions as repugnant to our national sense of fair play and decency. Those who defend the present system of Fifth Amendment non-recognition by SRO's frequently argue that such regulators are not government entities capable of pursuing criminal justice agendas and they do not have the power to convict anyone of a crime. But that of course begs

the question: *Since the courts deem SRO's to be quasi-governmental, are they actually quasi-criminal justice organizations conducting quasi-criminal investigations and adjudicating quasi-criminal indictments?* The Plaintiff is entitled to explore the answers to these questions through discovery proceedings.

For the foregoing reasons, Plaintiff, Jamie K. C. Scher, respectfully requests the appeal before this court be granted its entirety, and the matter remanded to the trial court for further proceedings.

Respectfully submitted,

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