UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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 OPPOSITION TO DEFENDANTS MOTION TO DISMISS PURSUANT TO FRCP 12(B)(6)

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PRELIMINARY STATEMENT

Plaintiff JAMIE K.C. SCHER has 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, by their own individual actions, intentionally, purposefully and with malice aforethought intimidated Plaintiff and caused her to be severely damaged by their wrongful conduct. Plaintiff seeks compensatory damages, punitive damages, consequential and incidental damages, attorney's fees, as well as all additional relief this court deems just and proper.

Defendants have not filed an Answer, but rather a motion to dismiss Plaintiff's Complaint pursuant to FRCP 12(b)(6). For the reasons set forth herein, the Defendants motion should be denied in its entirety because the Complaint clearly sets forth sustainable causes of actions.

The Defendant's arguments in their instant application rely upon issues of fact that cannot be disposed of summarily, which necessitate the denial of its motion.

STATEMENT OF FACTS

The Court and counsel are referred to the aversions of facts as set forth in the Plaintiff's Complaint, which for the purposes of this motion 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). The various interpretations and *misinterpretations* of the allegations of the Complaint that are recited in the Defendants' Brief in support of the Motion, *sub judice,* are intended to highlight the Defendants' contention that *no* material facts exist that would entitle Plaintiff to her day in Court. The Defendants' Brief is replete with instances where they have raised facts and matters that are outside the scope of the Complaint. These issues are irrelevant because a Motion to dismiss is not a proper vehicle for determination of facts outside the complaint. *Washington v. Official Court Stenographer,* E.D.Pa.1966, 251 F.Supp. 945. For instance, defendants' inclusion in their Brief regarding attorney William Singer, on page 4, is superfluous and designed to distract the reader from the real issues. While Mr. Singer may have been selected because of his "…familiarity with and expertise in connection with the NASD disciplinary process…", Mr. Singer was

in unchartered territory when he represented Plaintiff since there was no precedent to rely upon. As averred in the Complaint, Plaintiff was one of the first individuals sworn in at an on the record interview conducted by the NASD. As detailed in Plaintiff's complaint at page 6, the NASD had just recently received permission from the SEC to swear people in under oath. Neither the Defendants nor the attorney who represented Plaintiff had any idea of the procedure regarding the on the record interviews. In fact, one of the first points in Plaintiff's Complaint was that the NASD regulators failed to provide proper warnings to Plaintiff during the instructional stage of the interview. In later interviews with others, the Defendants corrected some of their mistakes by adding language with warnings regarding the possibility of criminal sanctions. (See Complaint Exhibit "D" Mika's transcript page 8-9.) As stated in the Complaint,

> 22. The SEC utilizes Form 1662 when it requests information from people. 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 as Exhibit "E".
>
> 23. 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 at Plaintiff's

interview. As can be seen, the NASD has 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 changing penalties. The defendants cannot deprive persons of their basic Constitutional rights. This court can set a precedent that will help ensure preservation of constitutional rights of all individuals that are subject to being questioned by the defendants in the future.

Another example of the Defendants traveling outside the scope of the complaint is the repeated reference that "plaintiff approaches this Court with unclean hands". Plaintiffs' only "mark" on her record stems from the case about which the Plaintiff is herein complaining. The inappropriate statements made in the motion are simply calculated to inflame the Court.

For the reasons as set forth herein, the defendants' Motion should be denied.

LEGAL ARGUMENT

I. PLAINTIFF'S TWELVE COUNT COMPLAINT STATES A CAUSE OF ACTION AGAINST THE DEFENDANTS 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 FOREGIOING 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 be dismissed unless it appears 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 is not subject to dismissal unless it appears to a certainty that the plaintiff cannot possibly be entitled to relief under any set of facts that could be proved in support of his 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; *Gruen Watch Co. v. Artists Alliance*, C.A.Cal.1951, 191 F.2d 700; *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 claim is proper procedure and should be sustained. *Foshee v. Daoust Const. Co.*, C.A.7 (Ind.) 1950, 185 F.2d 23. However, because <u>the granting of a motion to</u>

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 a motion to dismiss, the court considers whether relief is possible under any set of facts that could be established consistent with allegations in complaint, and will dismiss claim only if it is 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.

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.

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.

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 Complaint should be dismissed on the pleadings only if it appears beyond 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 the Defendant's arguments rely upon issues of fact, the denial of its' motion is appropriate.

II. DEFENDANTS ARGUMENT "A" THAT THEY ARE "ABSOLUTELY IMMUNE FROM THE COMPLAINT" MUST FAIL.

The Defendants contend, in Point III "A" of their Brief, that they are "absolutely immune from the Complaint." This argument should fail, as it is tantamount to saying that Plaintiff's claims are barred based upon the fact that Defendants are a governmental body entitled to sovereign immunity, as the SEC is. This position is espoused in the case annexed to Defendants Brief at Exhibit "E". In *American Benefits Group, Inc. v. National Assn. of Security Dealers*, 1999 WL 605246, S.D.N.Y.,1999, the Court held,

> The claims against the SEC must be dismissed because they are barred by sovereign immunity. The United States, "as sovereign, is immune from suit save as it consents to be sued." *United States v.. Sherwood*, 312 U.S. 584, 586 (1941). Courts do not have jurisdiction over suits against the United States, unless sovereign immunity is waived. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994). This doctrine extends to departments and agencies of the United States, including the SEC. *Id.* at 475; *Jorden v. Nat'l Guard Bureau*, 799 F.2d 99, 102 n. 3 (3d Cir.1986), cert. denied, 484 U.S. 815 (1987); *Sec. Exch. Comm'n. v. Independence Drilling Corp.*, 595 F.2d 1006, 1008 (5th Cir.1979); *Desiderio*, 2 F.Supp.2d at 522.

To extend the foregoing analogy to the Defendants in this case, which the Plaintiff agrees is the correct analogy to draw, would mean that the Defendants are "State actors" entitling the Plaintiff to invoke the Fifth Amendment Right and privilege against self incrimination that she was so obviously denied at

the time the Defendants forced her to testify at the time of her on the record interview. 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.

III. 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. However, in 1998 in *Sparta Surgical Corporation v. National Association of Securities Dealers* 159 F. 3d 1209, (9th Cir. November 6, 1998), the Ninth Circuit 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, 75th 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). *[Ed: 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 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 once again 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 . . . *[Ed: 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 this Court should not countenance that position.

IV. 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 inappropriately provided information to the D.A. from plaintiff's OTR as detailed in the Complaint. As such, Plaintiff was denied her 5th Amendment rights.

V. 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. As there are no conclusory findings of the NASD with regard to the Plaintiff's testimony at the O.T.R., 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, 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 ultimately 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.

VI. 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 5th 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 securities licenses she held. This was untrue when Defendants made these representations, and the Defendants knew them to be untrue when they made them.

VII. <u>THE DEFENDANTS ARGUMENT THAT THE STATUTE OF LIMITATIONS REGARDING PLAINTIFF'S CONSTITUTIONAL CLAIMS TOLLED BASED UPON 42 USC Sec. 1983 IS MISPLACED.</u>

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.

VIII. 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, 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 NOT SUBJECT TO DISMISSAL AT THIS TIME. 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. We know that while such referrals are made after completion and exhaustion of all internal administrative procedures at the NASD or SEC levels, that was not done 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.

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 motion of Defendants be denied in its entirety.

Respectfully submitted,

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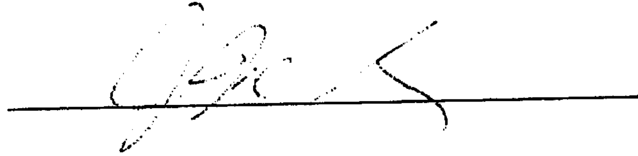

Dated: February 2, 2005

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

I, Stephen J. Scher, hereby certifiy that on this 2nd day of February, 2005, I caused copies of the Memorandum of Law in Opposition to Defendants Motion to Dismiss to be served on Ms. Alison Gooding, Esq., of Gibson, Dun & Crutcher LLP, counsel of record for the Defendants in this matter, by Express Overnight Mail.

Dated: February 2, 2005

Stephen J. Scher