TO BE ARGUED BY:
Avi Schick

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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

Plaintiff-Respondent,

-against-

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

Defendants,

RICHARD A. GRASSO,

Defendant-Appellant.

New York County
Index No. 401620/04

(captioned continued on inside cover)

BRIEF FOR RESPONDENT

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(cont'd from front cover)

RICHARD A. GRASSO,

Crossclaim-Plaintiff,

-against-

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

Crossclaim-Defendants.

RICHARD A. GRASSO,

Third-Party Plaintiff,

-against-

H. CARL McCALL,

Third-Party Defendant.

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PRELIMINARY STATEMENT

Plaintiff-respondent the People of the State of New York (the "State" or "Attorney General") submit this brief in opposition to defendant-appellant Richard A. Grasso's appeal from Supreme Court's, New York County (Ramos, J.), March 15, 2006, order, denying his motion to dismiss the first, fourth, fifth and sixth causes of action of the Complaint. (Record ["R."] 11).

The simple question posed by this appeal is whether the Not-For-Profit Corporation Law ("N-PCL") was designed to extinguish the Attorney General's equitable powers, permitting an executive who receives compensation in violation of the statute to retain the illegal pay if he accepted the pay without "knowing" it was illegal. Supreme Court answered "no," and this appeal ensued.

The appeal challenges the Attorney General's authority to assert four common law causes of action, on behalf of the State, seeking the disgorgement of excessive and unreasonable compensation paid to Grasso. Each of the challenged claims asserts that Grasso's compensation was prohibited by the N-PCL, in §§ 202(a)(12), 515(b), 715 or 716, respectively, and seeks disgorgement pursuant to principles of unjust enrichment and constructive trust. There is no dispute that a common law [u]njust enrichment claim "does not require the performance of any wrongful act by the one enriched. Innocent parties may frequently be unjustly enriched. What is required, generally, is that the party holding property under such circumstances that in

equity and good conscience he ought not to retain it." Simonds v. Simonds, 45 N.Y.2d 233, 242 (1978).

Grasso, however, asserts that the enactment of the N-PCL divested the State and other parties of their common law ability to maintain an unjust enrichment action for payments made in violation of these four N-PCL sections, none of which identify an internal standard of liability or a remedy. Grasso is wrong: over two centuries of case law has established the Attorney General's stewardship over the governance of not-for-profit corporations and his right at common law to sue in the People's interest. Recent decisions from the Court of Appeals and other courts confirm that the Attorney General's traditional common law powers co-exist alongside statutory enactments and, in particular, have survived the enactment of the N-PCL.

Grasso's argument that the N-PCL extinguished the Attorney General's common law powers would lead to injustice in this case and elsewhere. In this case, Grasso's construction of the N-PCL would preclude not only the Attorney General, but all parties, from recovering illegal compensation unless they can establish an intentional wrong on the part of Grasso. Under this argument, Grasso would be able to retain his excessive compensation even if a jury finds such compensation to be illegal on its face. See Grasso Br. at 25. Beyond this case, to hold that the Attorney General lacks common law authority over officers and directors of the NYSE would unsettle two centuries of law establishing the

Attorney General's common law supervision over all not-for-profit corporations, including charities.

Grasso argues that there is no role for considerations of notions of equity or fairness in the adjudication of this matter. But there is nothing unusual about the State's assertion of equitable claims against Grasso alongside its statutory claims. The Court should not countenance Grasso's attempt to insulate his compensation from judicial scrutiny. If Grasso's compensation was paid in violation of the N-PCL's prohibitions, the payments should be disgorged.

COUNTER-STATEMENT OF ISSUES PRESENTED

1. Did the enactment of the N-PCL extinguish the Attorney General's traditional common law authority over not-for-profit corporations?

Supreme Court answered in the negative.

2. Does the Attorney General have parens patriae standing to assert the People's interest in protecting New York not-for-profit corporations with regard to the four challenged causes of action?

Supreme Court answered in the affirmative.

3. Do the four challenged causes of action state claims for relief?

Supreme Court answered in the affirmative.

STATEMENT OF THE CASE

A. The Allegations in the Complaint

On May 24, 2004, the People of the State of New York, by their Attorney General, commenced this action against Grasso, Kenneth G. Langone ("Langone"), and the NYSE, a New York not-for-profit corporation,[1] based on the revelations that Grasso had received approximately $185 million from the NYSE during his eight-year tenure as its Chairman and CEO. Of this amount, the Complaint alleges that more than $80 million, plus another $80 million in retirement funds, were awarded or accrued during the period from mid-1999 to mid-2003, when Langone served as Chairman of the Compensation Committee. (R. 248). Grasso has filed a cross-claim against the NYSE seeking an additional $50 million.

The Complaint alleged six causes of action against Grasso: two statutory claims and four common law actions.[2] (R. 280-289). The two unchallenged statutory claims allege that Grasso as an

[1] On March 7, 2006, more than two years after Grasso's departure from the NYSE and nearly two years after the filing of this lawsuit, the NYSE reorganized into two distinct entities: (1) a New York not-for-profit regulatory entity; and (2) a Delaware for-profit public corporation. A challenge to this reorganization was addressed in Higgins v. New York Stock Exchange, 10 Misc. 3d 257 (Sup. Ct. N.Y. County 2005). On page 4 of his brief, Grasso incorrectly implies that the reorganization resulted only in the formation of the Delaware Corporation.

[2] The Complaint also alleges a cause of action against Langone for breach of fiduciary duty under N-PCL §§ 717, 720 (R. 287-289), and a cause of action against the NYSE under N-PCL §§ 202(a)(12), 515(b) (R. 289), neither of which is at issue in this appeal.

officer and director of the NYSE: (1) violated his fiduciary duties to the NYSE under N-PCL §§ 717(a), 720(a)-(b) by influencing and accepting awards of excessive compensation during his tenure as Chairman and CEO (R. 283-284); and (2) was the knowing recipient of "an unlawful conveyance, assignment or transfer of corporate assets" and such "conveyance" must therefore be "set aside" under N-PCL § 720(a)(2). (R. 282).

The four common law claims challenged by this motion allege that Grasso: (1) received unlawful and ultra vires compensation that was neither "reasonable" nor "commensurate with services performed" under N-PCL §§ 202(a)(12), 515(b), which he must repay under the common law theory of constructive trust (R. 280-282); (2) received compensation that was unlawful and contrary to public policy, conscience and equity, which he must repay under the theory of money had and received (R. 284-285); (3) received unlawful and ultra vires compensation that was not approved by a majority of the board of directors under N-PCL § 715, which he must repay (R. 285-286); and (4) received unlawful and ultra vires interest-free loans under N-PCL § 716, on which interest must be paid. (R. 286-287).

Each of the four common law causes of action relies upon the similar theory that compensation that is unlawful or ultra vires must be disgorged as unjust enrichment, and each of the four claims refers to a N-PCL violation as the basis of its allegation that Grasso's compensation is illegal and unjust. The four

common law claims are informed by statutory violations; however, they remain common law claims.

B. Procedural History

Although the Complaint was filed in May 2004, Grasso did not move to dismiss the four challenged causes of action until 15 months later in August 2005. By that time over 30 days of deposition testimony had occurred, and well over a million pages of documents had been exchanged in discovery, including substantial discovery on the four challenged causes of action.

Supreme Court heard argument on the motion on November 1, 2005, at which point Grasso's counsel argued that under the N-PCL's statutory scheme, Grasso is effectively insulated from having to repay illegally paid excessive compensation so long as it cannot be proven that he "knowingly" breached a duty to the NYSE when he accepted the payments.

> THE COURT: Are you suggesting that Mr. Grasso's – that if the jury should find that Mr. Grasso was excessively compensated, that he nevertheless does not have to return the extent of compensation unless he is found to have acted in bad faith?
>
> MR. ZWEIFACH: I am not telling you that, the legislature is telling you that.

(R. 353-355).

Later in the hearing the Court again expressed skepticism at Grasso's argument that the N-PCL limits the Attorney General's remedies to pursue excessive compensation:

> THE COURT: Mr. Grasso taking the position I didn't do anything, I just received the money. Unless there is a loop hole in the not-for-profit corporation law large enough to drive a Mack truck through, there's got to be some remedy for Mr. Grasso or anybody taking excessive compensation other than trying to sue the directors for acting in bad faith, like getting the money back from him. That's what the Attorney General seems to be trying to do . . . .
>
> MR. ZWEIFACH: 720 says you can sue the transferee whether he knows of his unlawfulness. You can sue anyone who is responsible for the management of assets, they don't discharge their duties. But a director and an officer can not be held liable under the statute at all under 717 unless he discharged his duties other than in good faith.

(R. 370-371).[3]

In its order and decision dated March 15, 2006, Supreme Court denied the motion to dismiss in its entirety. Rejecting Grasso's argument that the N-PCL extinguished the Attorney General's authority to assert common law claims, the Court held

[3] Grasso contends in his appellate brief that the existence of a written contract governing some of Grasso's compensation also bars the People's claims against him at common law, thus seeking to further insulate his pay from judicial review. Grasso Br. at 43.

that the Attorney General, as representative of the People of New York, had satisfied each of the three inquiries necessary to bring a parens patriae action, namely: (1) a quasi-sovereign interest, (2) affecting a significant segment of the population, and (3) a request for relief which individual parties could not obtain independently. With respect to the first parens patriae factor, the Court held the lawsuit asserts a quasi-sovereign interest of the People in that:

> The People have an interest in protecting New York's not-for-profit corporations, which are presumed to be particularly vulnerable, thus justifying public oversight.

(R. 21). Additionally, the Court noted the People have a "quasi-sovereign interest in ensuring that the NYSE promotes a fair and honest marketplace." (R. 29).

Second, the Court held that the lawsuit affects a substantial segment of New Yorkers, noting: "firms listed and utilizing the NYSE trading system include millions of investors, many of whom are residents of this State." (R. 29-30). Third, the Court determined that the State is more than a nominal party in this lawsuit, and not a mere proxy for the NYSE, but "represents the investing community that lacks the legal capacity to sue here." (R. 30). The Court added: "By granting Mr. Grasso's allegedly unreasonable compensation, the NYSE board failed to insure the integrity and viability of the NYSE as an

institution which in turn, affects the interests of the New York investing public." (R. 30).

Supreme Court also held that the four common law claims state claims for relief, noting, in particular, that Grasso's own challenges to the fifth and sixth causes of action raise triable issues of fact. (R. 35-36).

SUMMARY OF ARGUMENT

The Attorney General's standing to assert equitable common law claims against Grasso is well established. In light of the Attorney General's unique role as the State's chief law enforcement officer and representative of the People, his traditional common law powers cannot be extinguished by the enactment of a related statute unless such intent is clearly expressed by the Legislature. The N-PCL reflects no such intent to displace the Attorney General's historic common law powers, and, in fact, recent Court of Appeals decisions hold that even private parties may continue to assert common law claims against not-for-profit corporations along with or in lieu of N-PCL claims. Grasso has identified no precedent to the contrary.

The Attorney General has standing as parens patriae to assert common law claims against Grasso in this case. The Attorney General is tasked with protecting the assets of not-for-profit entities and that obligation is especially important with respect to the NYSE given its central role in ensuring a fair and

honest marketplace. Thus, the Attorney General has important quasi-sovereign interests in asserting this parens patriae action.

The common law actions at issue in this appeal are customary equitable claims of the type that ordinarily accompany statutory causes of action. The mere fact that these claims identify statutory violations in explaining why it would be unjust to permit Grasso to keep the excessive compensation does not convert the claims into statutory causes of action nor render the claims invalid, but simply recognizes the principle that common law claims may refer to or rely upon statutory violations.

The cases upon which Grasso relies in an effort to avoid the Attorney General's parens patriae authority are inapposite, either because they are grounded upon principles of federal preemption which do not apply here, or because they concern attempts by private individuals to imply rights of action for money damages from statutes. Grasso's argument that this lawsuit seeks only a transfer of assets between private parties ignores that any recovery in this action would be directed to the NYSE's not-for-profit regulatory arm for its general public purposes.

Lastly, each of the common law causes of action challenged in this appeal state a claim, despite Grasso's efforts to argue otherwise.

ARGUMENT

POINT I

THE ATTORNEY GENERAL CAN ASSERT COMMON LAW CLAIMS UNDER THE N-PCL

A. The Attorney General's Traditional Common Law Powers Are Not Extinguished by the Enactment of Related Statutes Unless the Statute Expressly Limits His Authority.

Grasso's main argument is that the NPCL's structure implicitly limits the Attorney General's enforcement powers against not-for-profit corporations and their directors and officers to the remedies expressly authorized in the statute. Grasso is wrong. Two centuries of case law have established that even though the enactment of statutory law may preclude individuals from asserting related common law claims, the Legislature's grant of statutory powers to the Attorney General does not displace the traditional common law powers inherent in that Office.[4]

As explained in People v. Kramer, 33 Misc. 209, 213 (Gen'l Sess. N.Y. County 1900):

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[4] Grasso's argument that the statute's remedies are exclusive is belied by the language of N-PCL § 719(f), recognizing that the statute's remedies are written against the backdrop of existing law: "this section shall not affect any liability otherwise imposed by law upon any director or officer." Although it was unnecessary to include similar clarification in other parts of the statute, N-PCL § 719(f) was inserted to ensure that a narrow exception in N-PCL § 719(e) would not swallow existing common law bases for liability.

> As the powers of the attorney-general were not conferred by statute, a grant by statute of the same or other powers, would not operate to deprive him of those belonging to the office at common law, unless the statute, either expressly or by reasonable intendment, forbade the exercise of powers not thus expressly conferred. He must be held, therefore, to have the powers belonging to the office at common law, and such additional powers as the legislature has seen fit to confer upon him.

Kramer, 33 Misc. 209 (quoting People v. Miner, 2 Lans. 396, 399 (Sup. Ct. Gen'l Term (1868))).

The Attorney General's powers are neither exclusively enumerated, nor limited, by statute, but instead derive from his historic common law role as the "chief legal representative of the sovereign in the courts, and . . . his duty to appear for and prosecute in behalf of the crown any matters criminal as well as civil." Kramer, 33 Misc. at 213-14. As the sovereign's chief representative in the Colonial period, the Attorney General "was clothed with certain rights and powers derived from the common law," Kramer, 33 Misc. at 213, and he continued to exercise this common law authority unchanged when the State's first Constitution was adopted in 1777. See People v. Gilmour, 98 N.Y.2d 126, 129-30 (2002); Oliver W. Hammands, The Attorney General in the American Colonies, Series I, No. 2 at 2-3 (1939) (R. 96-97, 101-104); 1 Charles Z. Lincoln, The Constitutional History of New York 564 (1906) (R. 104, 120-122).

Thus, the Attorney General's powers pre-exist any statutory scheme and are not statutory in origin. Subsequent amendments to the New York State Constitution,[5] and state statutes,[6] may have recognized and described the Attorney General's extensive role in state affairs, but the courts have consistently held that subsequent Legislative grants of authority do not by implication limit the Attorney General's common law authority. See State v. Cortelle Corp., 38 N.Y.2d 83, 88 (1975) (State's common law remedies against corporations are "pre-existent to and independent of the enactment of the procedural remedy in [Business Corporation Law] section 1101"); Matter of Bennett v. Merritt, 173 Misc. 355, 360 (N.Y. Sup. Ct., Extraordinary Trial and Special Term, Orange County 1940) (citing Kramer with approval), aff'd, 261 A.D. 824 (2nd Dep't), aff'd, 286 N.Y. 647 (1941); People v. Tru-Sport Publishing Co., 160 Misc. 628 (Sup. Ct. N.Y. County 1936) ("As regards the power of the Attorney-General as the general public prosecutor and defender in all

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[5] New York's Second Constitution provided the first outlines of the Attorney General's office, N.Y. Const. of 1821, art. IV, § 6 (R. 127), and the current State Constitution states: "[t]he head of the . . . . of the department of law, [shall be] the attorney-general." N.Y. Const., art V, § 4.

[6] The Attorney General's statutory authority is spread out over many statutes, but the office is recognized by Executive Law § 60 ("The head of the department of law shall be the attorney-general who shall receive annual salary of one hundred fifty-one thousand five hundred dollars") and § 63(1) ("[t]he attorney-general shall: (1) Prosecute and defend all actions and proceedings in which the state is interested.")

legal matters that concern the sovereign, he is still supreme in so far as any legislative enactments have expressly taken away or limited that power. No express shearing away of any of his ancient powers can be found”); People v. Brennan, 69 Misc. 548, 548 (County Ct. Kings County 1910) (“An examination of the history of the powers and duties of the Attorney-General seems to disclose that the Attorney-General still retains his common law powers, with such added powers as have been granted by the State Constitution and the statutes”).

Accordingly, Grasso cannot demonstrate that the enactment of the N-PCL precluded the Attorney General from asserting common law claims against him.

B. The N-PCL’s Remedies Are Not Exclusive and Did Not Eliminate the Attorney General’s Common Law Causes of Action.

Grasso asserts that the N-PCL “manifests the Legislature’s intention to assign a defined role to the Attorney General” by displacing his common law authority to bring actions against not-for-profit corporations. Grasso Br. at 20, 30. But Grasso can point to no legal precedent or evidence to indicate that the enactment of the N-PCL extinguished the Attorney General’s historic common law powers in this context.[7]

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[7] Grasso fails to mention that to adopt his arguments would eviscerate the Attorney General’s traditional common law

(continued...)

In fact, the Attorney General has for over a century exercised common law powers over not-for-profits alongside the powers granted to him under the N-PCL. See Lefkowitz v. Lebensfeld, 68 A.D.2d 488, 495 (1st Dep't 1979), aff'd, 51 N.Y.2d 442 (1980) (Attorney General's authority to compel charitable donations and to ensure that such donations are applied to charitable purposes can be "of statutory or equity origin") (emphasis added); Spitzer v. Lev, Index No. 4000989, 2003 N.Y. Slip Op. 51049U, at *7 (Sup. Ct. N.Y. County June 5, 2003) (Attorney General's supervision of not-for-profit corporations "is in addition to the Attorney General's common law parens patriae authority to protect the public interest in charitable property"); Vacco v. Aramony, N.Y.L.J. Aug, 7, 1998, at 22 (Sup. Ct. N.Y. County 1998) ("Attorney General is responsible for overseeing the activities of New York not-for-profit corporations and the conduct of their officers pursuant to the N-PCL, the EPTL, and his common law parens patriae authority") (R. 81-89); Vacco v. Diamandopoulos, 185 Misc. 2d 724, 729-30 (Sup. Ct. N.Y. County 1998) (in excessive compensation action under N-PCL, setting forth elements for Attorney General's parens patriae claims for conversion, unjust enrichment and money had and

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[7] (...continued)
authority to proceed against all not-for-profit corporations, including charities, overturning years of established precedent.

received against law firm);[8] Victoria B. Bjorkland et al., New York Nonprofit Law and Practice: With Tax Analysis, § 11-5(b)(2), at 421 (1997) ("the Attorney General is authorized by both common law and by the N-PCL to bring actions on behalf of beneficiaries . . . ."); see also People v. Ingersoll, 58 N.Y. 1, 14 (1874) ("[i]t is well settled in England that, in right of the prerogative of the crown, the attorney-general, in his name of office, may proceed, either by information or by bill in equity, to establish and enforce the execution of trusts of property by public corporations, to prevent the misappropriation or misapplication of funds or property raised or held for public use; and the abuse of power by the governors of corporations or public officers, or the exercise of powers not conferred by law") (emphasis added).

Indeed, the Court of Appeals recently addressed this issue in Consumers Union of U.S., Inc. v. State of New York, 5 N.Y.3d 327 (2005), concerning a challenge to the conversion of Empire Blue Cross Blue Shield ("Empire") from a not-for-profit corporation to a for-profit entity. Plaintiffs, a group of Empire's subscribers and health organizations claiming to be

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[8] Supreme Court noted that although Diamandopoulos permitted the Attorney General's common law claims to proceed, "the Attorney General's authority was not at issue in that case." (R. 28). The State acknowledges Supreme Court's clarification, but cites the case as precedent for the exercise of Attorney General common law authority in the not-for-profit context.

adversely affected by Empire's conversion, alleged that the conversion failed to follow the procedures set forth in the N-PCL, and that Empire's directors breached their fiduciary duties by authorizing the conversion. 5 N.Y.3d at 350. Citing N-PCL § 720, Empire raised the same argument now made by Grasso, namely that plaintiffs lacked standing to proceed because they "are not within any of the classes of parties authorized by the Not-For-Profit Corporation Law to challenge the Board's conduct (see N-PCL 720(b))." Id. at 350-51. The Court disagreed, holding that given the unique circumstances of the case, the N-PCL did not provide the exclusive means of establishing standing against a not-for-profit corporation and its directors and officers, and that plaintiffs therefore had standing to proceed "for purposes of protecting Empire's not-for-profit assets." 5 N.Y.3d at 354.

The Court of Appeals reached the same conclusion twenty years earlier in Alco Gravure, Inc. v. The Knapp Foundation, 64 N.Y.2d 458 (1985). In that case, a not-for-profit foundation sought to amend its certificate of incorporation under N-PCL § 804 to transfer certain assets to another foundation. 64 N.Y.2d at 463. Plaintiffs, a corporation claiming to be a beneficiary of the foundation and two of the corporation's employees, challenged the certificate amendment as an improper means of transferring the assets. As in the present appeal, defendant argued that plaintiffs lacked standing because N-PCL § 804(a)(ii) specifically confers enforcement authority on the

Attorney General. Id. at 465-66. Notwithstanding the N-PCL's express remedy, the Court held that both the corporation and the two employees had common law standing because they can assert "special interests" in the funds held for charitable purposes. Id.; see also Smithers v. St. Luke's-Roosevelt Hospital Ctr., 281 A.D.2d 127 (1st Dep't 2001) (in donor enforcement action, holding that because "common law of the State of New York permits [the donor's administratrix] to bring this action, we need not reach the issue of whether N-PCL 522 authorizes it") (emphasis added).

Finally, just a few months ago, Supreme Court reached a similar conclusion in Higgins v. New York Stock Exchange, 10 Misc. 3d 257 (Sup. Ct. N.Y. County 2005), a suit challenging the fairness of NYSE's planned merger with Archipelago Holdings, LLC. Plaintiffs in that case consisted of four members, or "seatholders," of the former NYSE, alleging that the proposed merger with Archipelago unfairly withheld from the NYSE's members the financial gains of the transaction. Id. at 258, 260-61. Just as in this appeal, defendants argued that plaintiffs lacked standing because N-PCL § 623 specifically provides a mechanism for members to challenge corporate actions, and the plaintiffs had not satisfied that provision. Id. at 264. Supreme Court, however, disagreed, holding that while N-PCL § 623 addresses one manner by which members can bring derivative actions against a not-for-profit corporation, it is not exclusive, and actions

alleging direct member harm can be asserted under the common law. Id. at 264, 273-74.

Grasso will undoubtedly argue that the common law bases for standing recognized above do not apply in this case because the Attorney General is not seeking to block a conversion as in Consumers Union, prevent an amendment to the certificate of incorporation as in Alco Gravure, enforce a charitable donation as in Smithers, or assert a direct member's action as in Higgins. But the case law is overwhelmingly clear: the statutory heads of standing found in the N-PCL are not exclusive. Instead, alternative bases for standing exist at common law and were not extinguished by the enactment of the N-PCL.

C. Grasso Has Cited No Authority That the N-PCL's Provisions On Standing Are Exclusive.

Grasso has cited no authority to suggest that the Legislature intended the N-PCL's standing provisions to bar the Attorney General from exercising his historic parens patriae bases for standing against not-for-profit corporations.

When the Legislature seeks to exclude a statute from the scope of the common law, it has the power to so provide. For instance, in Consumers Union, 5 N.Y.3d at 345, when the Legislature determined it wanted the conversion of Empire to proceed without challenge under the common law, it enacted

Insurance Law § 7317(f), providing that compliance with the statute:

> shall be deemed to constitute compliance with and shall supercede all such other legal requirements, including, but not limited to statutory, common law and other requirements relating to not-for-profit corporations and fiduciary requirements applicable to the board of directors of any company filing a plan pursuant to this section.

§ 7317. No such similar bar on common law standing can be found in the N-PCL. See also Uhr v. East Greenbush Central School Dist., 94 N.Y.2d 32 (1999) (refusing to imply private right of action against school district under Education Law § 905(1) because § 905(2) expressly provided school district "shall not suffer any liability" for its conduct under § 905(1))(emphasis added).

Grasso's appeal relies almost exclusively on Lefkowitz v. Lebensfeld, but that case stands for the unsurprising proposition that the Attorney General lacks standing under the Estates, Powers and Trust Law ("EPTL") to enforce the rights of a for-profit corporation's shareholders merely because the shares in question were once donated as part of a charitable bequest, and were owned by a not-for-profit corporation.

In Lebensfeld, a donor bequeathed shares of stock in a company to several charities. Years later, several of the charitable donees brought a shareholders' suit against the company to compel dividends alleged to be owing under its

certificate of incorporation. Some of the other charities who had received stock in the bequest, however, did not join in the suit, and the Attorney General brought suit on behalf of these non-participating charities asserting that in the face of their inaction, he could step into their shoes due to his role as representative of their ultimate beneficiaries. The Court of Appeals ruled that the Attorney General lacked standing under the EPTL to assert the legal claims of non-participating charities without at least first making a demand on their corporate boards. 51 N.Y.2d at 447 ("Attorney-General is stepping in the shoes of the charity without first making a demand upon the corporation or satisfying the other procedures normally associated with a derivative action.").[9]

Indeed, the Court of Appeals did not address the Attorney General's standing under the N-PCL, but only the "theory that the Attorney General represented the ultimate beneficiaries under the EPTL." 51 N.Y.2d at 447-48 (emphasis added). The Attorney General had sought to justify standing based on provisions found in the N-PCL, but the Court stated: "we do not decide whether and

[9] The trial court noted in its decision that to permit the Attorney General to assert the commercial or property rights of a not-for-profit corporation merely because it had received property as part of a charitable disposition "could lead to such incongruous results as the Attorney-General suing a contractor for failing to perform a painting contract for a hospital, or even, in the case of Dartmouth College, suing a student who has not paid his tuition." 95 Misc. 2d at 546.

in what instances the Attorney-General possesses standing under the Not-For-Profit Corporation Law," holding that the issue had not been preserved on appeal. Id. at 447-48

Further, unlike the charities in Lebensfeld which chose not to participate in the lawsuits, the NYSE affirmatively invited the Attorney General to pursue this matter in a letter dated January 8, 2004, stating:

> The view of the board is that the most appropriate action is to turn over the Webb Report (without waiving the client-attorney privilege under which it was produced) to you, the Securities and Exchange Commission and the Attorney General of the State of New York, and ask that you pursue the matter both on our behalf and as part of your broader responsibilities.

(R. 140).

Accordingly, Grasso has located no authority, in Lebensfeld or elsewhere, to preclude the Attorney General from asserting common law claims against not-for-profit corporations, or their officers and directors.

POINT II

THE ATTORNEY GENERAL HAS PARENS PATRIAE STANDING TO SEEK EQUITABLE RELIEF AGAINST GRASSO UNDER THE FIRST, FOURTH, FIFTH AND SIXTH CAUSES OF ACTION

Having established that the Attorney General's authority to assert common law claims was not extinguished by the N-PCL, the only remaining question is whether standing exists at common law for the Attorney General's common law claims.

The Attorney General's standing to assert the common law causes of actions derives from his parens patriae powers. In Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 607 (1982) ("Snapp"), the Supreme Court upheld the right of individual States to bring actions in parens patriae that touch upon quasi-sovereign interests reflecting collective or state interests independent from the interests of individual private parties.[10] To assert parens patriae authority —

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[10] Contrary to Grasso's assertion, the State's parens patriae authority is not limited to supervision of charities, Grasso Br. at 35, but extends to any number of businesses and marketplaces upon which the public rely. See People v. Town of Wallkill, 01-Civ-0364, 2001 U.S. Dist. LEXIS 13364 (S.D.N.Y. Mar. 16, 2001) (upholding Attorney General's parens patriae authority to commence action for civil rights violations); Matter of Co-operative Law Co., 198 N.Y. 479, 485-86 (1910) (Attorney General's appearance in suit alleging unlawful practice of law by corporation was proper because "his ancient common-law duty to represent the People called upon him to take part in a controversy in which the People are vitally concerned"); In re Taibbi, 213 B.R. 261, 270 (Bankr. E.D.N.Y 1997)(upholding Suffolk County's parens patriae authority to commence suit on behalf of defrauded consumers to determine whether bankruptcy debtor had nondischargeable debt); Abrams v. Love Canal Area Revitalization Agency, 134 A.D.2d 885, 886 (4th Dep't 1987) (Attorney General has standing to assert violation of the state Environmental Quality Review Act because the "expressed [environmental] interests are of State-wide concern and the Attorney General, as the State's chief law enforcement officer, has standing to take appropriate action to protect those interests"); State v. Local 1115, 56 A.D.2d 310, 318-19 (1977) (Attorney General has common law authority to seek equitable intervention to enjoin labor strike); Diamandopoulos, 185 Misc. 2d at 729-30 (Sup. Ct. N.Y. County 1998) (permitting State's parens patriae causes of action against law firm on behalf of not-for-profit corporation); see also cases cited in Supreme Court's March 15, 2006, Order. (R. 26-27).

literally authority as the parent of the country — a state attorney general must identify a sovereign or quasi-sovereign interest in the "health and well-being — both physical and economic — of its residents in general." 458 U.S. at 607. Secondly, Snapp held that the alleged injury in a parens patriae suit must affect a "substantial segment" of the State's population. 458 U.S. at 607. The Snapp Court required nothing further. However, some later courts have added a third inquiry, which considers whether those affected would be able to obtain independently all of the relief sought by the Attorney General in parens patriae. See People v. The Mid Hudson Medical Group, P.C., 877 F. Supp. 143, 146-49 (S.D.N.Y. 1995).

In his brief, Grasso limits his appeal to the first inquiry under Snapp, arguing that the Attorney General is not asserting a quasi-sovereign interest on behalf of the people, but simply an effort "to shift money from one private party to another." Grasso Br. at 4. The second and third inquiries under Snapp are not argued by Grasso and therefore are abandoned on appeal. See Adams Drug Co. v. Knobel, 172 A.D.2d 470, 470-71 (1st Dep't 1991).

A. The State Has a Quasi-Sovereign Interest in Protecting the Assets of the NYSE and Ensuring that It Promotes a Fair and Honest Marketplace for Investors.

The State has a quasi-sovereign interest in protecting the integrity of the not-for-profit form as well as ensuring that the NYSE provides a fair and honest marketplace to the investing public.[11] Grasso seeks in vain to recast this action as a mere private quarrel between himself and the NYSE, or as an effort to transfer assets from one private party to another. Grasso Br. at 31. Supreme Court, however, recognized that this lawsuit benefits the millions of New Yorkers who depend upon the NYSE: (1) to use its assets for public purposes; and (2) provide a fair and honest marketplace for the trading of securities. (R. 21). Furthermore, Grasso ignores that the State intends to direct the funds disgorged in this action to NYSE Regulation, the newly formed New York not-for-profit regulatory arm of the New York Stock Exchange. (R. 365-66).[12]

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[11] Grasso selectively cites the Attorney General's statement on "The Regulatory Role of the Attorney General's Charities Bureau," claiming that it recognizes that the Attorney General's parens patriae authority extends only to charities. Grasso Br. at 35. In fact, the statement notes that the Attorney General's parens patriae power is "to protect the interest of the public in assets pledged to public purposes." (R. 327). This includes type A not-for-profit corporations such as the NYSE. Similarly, Grasso's citation to an Appellate Division, Second Department brief, filed by the Attorney General in 2004, Grasso Br. at 35-36, fails to include the statement that with regard to type A not-for-profit corporations, "the Attorney General in his role as parens patriae will have the opportunity to protect the interests of the public or any unrepresented charitable beneficiaries in the dissolution process." (R. 331) (emphasis added).

[12] The trial court has authority to direct the recovery in this (continued...)

Not-for-profit corporations are different than business corporations in that they may not distribute their assets through dividends, loans or unreasonable compensation to officers and directors, but must ensure that their assets are directed to the public purposes set forth in their charters. See N-PCL §§ 102(a)(5), 202(a)(12), 515(b), 715(f), 716. This policy is reflected in the definition of not-for-profit corporations under N-PCL § 102(a)(5) as an entity organized:

> exclusively for a purpose or purposes, not for pecuniary profit or financial gain . . . and no part of the assets, income or profit of which is distributable to, or enures to the benefit of, its members, directors or officers except to the extent permitted under this statute.

§ 102(a)(5) (emphasis added).

As explained in American Baptist Churches of Metropolitan New York v. Galloway, 271 A.D.2d 92, 97 (1st Dep't 2000):

> A Not-For-Profit Corporation . . . is simply a corporation that devotes whatever proceeds it receives from its operations to charitable causes rather than disbursing the funds as

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[12] (...continued)
lawsuit to the newly formed not-for-profit entity. See C.P.L.R. 3017(a) (Supreme Court may "grant any type of relief within its jurisdiction, appropriate to the proof whether or not demanded, imposing such terms as may be just."). On April 21, 2006, the State filed a motion in this Court to include in the record materials before Supreme Court that were omitted by Grasso. These materials include the NYSE's Amended and Restated Agreement and Plan of Merger ("Merger Plan") and a Reuters news item dated November 2, 2005, discussing the use of the recovered assets in this case. Section 1.1(c) of the Merger Plan provides for the formation of a New York not-for-profit corporation.

> dividends to shareholders and compensation to executives.

Id. (emphasis added); see Naarim v. Kunda, 2005 N.Y. Slip Op. 50844U, 2005 N.Y. Misc. LEXIS 1149, at *2 (Sup. Ct. Kings County Jun. 7, 2005). These special safeguards over not-for-profit corporations ensure that monies obtained by not-for-profits are directed to the public purposes of these corporations.[13]

Not-for-profit corporations also exhibit a particular "vulnerabil[ity]" in that they lack the internal controls of business corporations to ensure that their assets are directed to public purposes. (R. 21). see 64th Assocs. v. Manhattan Eye, Ear, & Throat Hosp., 2 N.Y.3d 585, 590 (2004) ("MEETH") ("The law is different in the case of not-for-profit entities. . . . Given the absence of shareholders,[14] profits and other market devices to ensure the efficacy of contracts and regularity of operations, the statute contemplates significant public oversight of the finances and major transactions of such entities"); American

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[13] The prohibitions against excessive compensation found in N-PCL §§ 202(a)(12), 505(b), at the heart of this lawsuit, are merely outgrowths of the anti-dividend rule that not-for-profit assets must be channeled to the corporation's public purposes and not diverted to the personal enrichment of its managers.

[14] Grasso cannot argue that the NYSE's members serve the salutary role of corporate shareholders, because the NYSE's members were not informed of Grasso's compensation until after the illegal compensation had been paid in August 2003. Similarly, Grasso testified at deposition that he did not notify the Attorney General of the illegal payments until after they had been effected in August 2003.

Baptist Churches, 271 A.D.2d at 98 ("[w]hat distinguishes a not-for-profit is not whether it receives money, but what it does with the money"); Hendryx v. City of New York, 3 Misc. 3d 512, 514 (Sup. Ct. N.Y. County 2004).

Accordingly, the State has a quasi-sovereign interest in ensuring that the NYSE, as a not-for-profit corporation, applies its assets to its public purpose and does not divert not-for-profit monies to line the pockets of its executives. The common law claims in this litigation vindicate this interest because they seek to recover monies dissipated through excessive payments to Grasso.

Of equal importance, the State also has a quasi-sovereign interest in protecting its citizens from unlawful practices and ensuring a fair and honest marketplace. In State of New York v. General Motors Corp., 547 F. Supp. 703 (S.D.N.Y. 1982), the United States District Court for the Southern District of New York held: "[t]he State's goal of securing an honest marketplace in which to transact business is a quasi-sovereign interest." 547 F. Supp. at 705. Grasso contends that General Motors was brought pursuant to Executive Law § 63(12) and is not a parens patriae case, but the Court did not draw this distinction and recognized that the two forms of action can co-exist:

> Because of the State's quasi-sovereign interest in securing an honest marketplace, it would have parens patriae standing to bring this action even without the authority provided by New York Executive Law § 63(12).

> Indeed, GM recognizes that this is a <u>parens patriae</u> action.

547 F. Supp. at 706.

The Court below recognized the NYSE's central role in ensuring the fair and honest operation of securities markets, noting that:

> firms listed and utilizing the NYSE trading system include millions of investors, many of whom are residents of this State. Indeed, as a not-for-profit corporation, the ultimate beneficiaries of the NYSE itself are the members of the investing public. Thus, this motion necessarily affects a 'substantial segment' of the population and the Attorney General, acting on behalf of the State of New York, is therefore not merely a nominal party.

(R. 29-30).

Indeed, Grasso himself has often emphasized the NYSE's role as a "public trust," espousing the public purpose of the NYSE and its broad public impact:

> You know, my customer base is very simply those 85 million Americans[[15]] who own the great companies that we trade. . . . It's important, Sue, for me to tell your viewers, OK, that it would not only take into question the integrity of the market structure, but it would once again test public confidence. And I can assure you and assure your viewers that anyone who approaches putting the customer second is going to be off this floor and out of this industry. There are no ifs, ands, or

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[15] Grasso reaffirmed this view at his deposition on April 4, 2006, testifying: "the seat owners were the, in essence, owners of the brick and mortar. The 85 million investors were the owners of the companies that brought life to the brick and mortar."

> buts. The public trust is what fuels the growth and strength of our market.

(R. 134) (emphasis added).[16] Thus, given the NYSE's "public trust" role, the People have an additional interest in ensuring that the NYSE adheres to the provisions of the Not-For-Profit Corporation Law and follows proper corporate governance practices.

Grasso argues that the State is estopped from calling attention to NYSE's role as a public marketplace because in the briefing before the United States District Court for the Southern District of New York,[17] the State argued that this action does not assert direct claims for violation of the federal securities laws. Grasso Br. at 32. The District Court recognized that "the wrongdoing alleged by the complaint is not a violation of federal law," but noted that federal law "constitute[s] the context of the complaint." People v. Grasso, 350 F. Supp. 2d at 503.

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[16] The significance of the NYSE in promoting a fair and honest marketplace is underscored by its status as a "National Securities Exchange" and a "self-regulatory organization" under the Securities Exchange Act of 1934, 15 U.S.C. §§ 78c(a)(26), 78(f). Among the NYSE's statutory duties are "to promote just and equitable principles of trade" and "to protect investors and the public interest." 15 U.S.C. § 78(f)(5).

[17] The detour to federal court in this matter was caused by Grasso's ill-conceived removal of the action shortly after the Complaint was filed. The District Court remanded the action to state court in People v. Grasso, 350 F. Supp. 2d 498 (S.D.N.Y. 2004).

Thus, the State is not asserting claims against Grasso for violations of federal law, but calling attention to his regulatory failures as a basis for its state-law claims that he was over-compensated. The Complaint's lack of direct allegations under federal securities law, however, does not mean that this Court must turn a blind eye to the importance of the NYSE to New York's investors and the quasi-sovereign interests of its People.

B. The Attorney General's Common Law Claims Are Well-Established Equitable Claims.

Grasso argues that even if the Attorney General has parens patriae authority to assert common law claims, he lacks standing in this case because the four challenged common law claims are impermissibly tied to the N-PCL. On its face, this argument has already been addressed: the Attorney General has parens patriae authority to assert common law claims as established in Point I, supra, and the common law claims asserted here — constructive trust, unjust enrichment and money had and received — are well established and legally unremarkable.

To the extent Grasso argues that the common law claims are defective because they seek to "rewrite" statutory standards of liability for recovering Grasso's receipt of illegal compensation, he is also mistaken. Grasso Br. at 26. The four challenged causes of action look to four prohibitions in the N-PCL as a basis for their claims that Grasso's compensation

constitutes unjust enrichment. However, the four statutory prohibitions do not contain any language setting forth a "standard of liability" as Grasso contends. See N-PCL §§ 202(a)(12), 515(b), 715, 716. The State's claims are informed by the statutory prohibitions established by the N-PCL, but do not seek to co-opt or change the statutory law.

The use of statutory prohibitions as a basis for recovery at common law claim is hardly a novel idea. See e.g., Elliott v. City of New York, 94 N.Y.2d 730 (2001) (recognizing that in common law negligence cases, "violation of a State statute that imposes a specific duty constitutes negligence per se"); County of Westchester v. Sheehan, 292 A.D.2d 482 (2d Dep't 2002) (authorizing common law action to recover benefit paid illegally under General Municipal Law § 207-c).

Indeed, just recently, in State Farm Mutual Automobile Ins. Co. v. Mallela, 4 N.Y.3d 313 (2005),[18] the Court of Appeals held common law claims for unjust enrichment could be predicated directly upon Insurance Law § 5102 and 11 N.Y.C.R.R. § 65-3.16(a)(12), a regulation rendering fraudulently licensed

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[18] Mallela was commenced in the United States District Court for the Eastern District of New York. On appeal to the Court of Appeals for the Second Circuit, that Court certified to the New York Court of Appeals the question of whether under New York State's insurance regulatory scheme, fraudulently licensed medical corporations are entitled to reimbursement by insurers for medical services rendered. State Farm Mutual Automobile Insurance Co. v. Mallela, 372 F.3d 500, 510 (2d Cir. 2004).

health care providers ineligible for reimbursement for medical services they provide.

In Mallela, an insurance carrier asserted common law unjust enrichment claims against improperly incorporated health care providers, seeking restitution of prior insurance payments. 4 N.Y.3d at 319. As in this case, plaintiff's unjust enrichment claim was informed by a statute, Insurance Law § 5102, and a regulation, 11 N.Y.C.R.R. § 65-3.16(a)(12), which provides:

> A provider of health care services is not eligible for reimbursement under section 5102(a)(1) of the Insurance Law if the provider fails to meet any applicable New York State or local licensing requirement necessary to perform such service in New York . . . .

§ 65-3.16(a)(12).

The Court of Appeals held insurance carriers may pursue common law unjust enrichment claims against improperly incorporated health care providers based on the text of the regulation. 4 N.Y.3d at 322; see also Allstate Ins. Co. v. Belt Parkway Imaging, P.C., Index. No. 600509, 2006 N.Y. Slip Op. 26024, 2006 N.Y. Misc. LEXIS 140, at **8-9 (Sup. Ct. N.Y. County Jan. 25, 2006) (reinstating plaintiffs' claims for unjust enrichment based on 11 N.Y.C.R.R. § 65-3.16(a)(12) based on Court of Appeals decision in Mallela); Multiqest, P.L.L.C. v. Allstate Ins. Co., Index No. 96837/04, 2005 N.Y. Slip Op. 52069U, 2005 N.Y. Misc. LEXIS 2836, at **17 (Civ. Ct. Queens County Dec. 19, 2005) ("the Court of Appeals is implicitly recognizing the

viability of a cause of action for fraud and unjust enrichment pursuant to [11 N.Y.C.R.R.] § 65-3.16(a)(12)"). Thus, the Court of Appeals has recognized that there is nothing unusual about asserting an unjust enrichment claim based upon a statutory violation.

Mallela holds another important lesson for this case: the health care providers sued under the common law were also subject to Business Corporation Law ("BCL") § 1101(a)(1), which provides that the Attorney General may sue to dissolve any corporation that "procured its formation through fraudulent misrepresentation or concealment of a material fact." 372 F.3d at 503. Thus, even though the Mallela defendants, as in this case, were subject to an alternative enforcement remedy under statute, the Court did not find that the plaintiff's remedies were limited to statutory dissolution under the BCL.

Grasso's cases in support of his argument that the Attorney General's common law claims cannot refer to the N-PCL all concern instances where a private individual sought to imply a direct right of action for monetary damages from a statute. See Mark G. v. Sabol, 93 N.Y.2d 710 (1999) (suit by eleven children seeking to imply a private right of action for money damages against the State from provisions in article 6 of the Social Services Law concerning the financing and management of state child welfare services); Uhr v. E. Greenbush Cent. Sch. Dist., 94 N.Y.2d 32 (1999) (parents of scoliotic infant seeking to imply private

cause of action for money damages against school district based on Education Law § 905 requiring schools to conduct annual examinations for scoliosis); Sheehy v. Big Flats Community Day, Inc., 73 N.Y.2d 629 (1989) (intoxicated minor struck by car seeking to imply monetary right of action from Penal Law § 260.20 imposing criminal penalties for providing alcohol to minors). Grasso Br. at 25, 28.

It hardly bears mention that unlike Grasso's cases, the Attorney General is not seeking to imply a private right of action for money damages. First, the Attorney General is not a private party but the chief law enforcement officer of the State, charged particularly with the duty to protect the public's interest in not-for-profit corporations. See MEETH, 2 N.Y.3d at 589-90; Love Canal Area Revitalization Agency, 134 A.D.2d at 886 (Attorney General has standing to assert violation of the state Environmental Quality Review Act because "Attorney General, as the State's chief law enforcement officer, has standing to take appropriate action to protect those interests"); Tru-Sport Publishing, 160 Misc. at 637 ("Attorney-General as the general public prosecutor and defender in all legal matters that concern the sovereign").

Moreover, the Attorney General is not seeking money or compensatory damages for any individual's injuries, but asserting an equitable remedy in the interests of the public who rely on the integrity of the NYSE's marketplace and on the N-PCL.

Finally, the Attorney General is not asserting a direct action under the N-PCL, but is relying upon established common law equitable claims.

If the State's equitable claims impose different or greater burdens on Grasso than those that may be found in some sections of the N-PCL, that is neither surprising nor unfair. That is simply the nature of equity. See SEC v. Cavanagh, No. 04-5402-cv, 2006 U.S. App. LEXIS 8809, *8, 38 (2d Cir. Apr. 10, 2006) (equitable remedy of disgorgement can be asserted against defendants in securities fraud action who received gratuitous shares of stock, because although they committed no wrongdoing, "they profited from the fraud and have no just claim to the profits"); Simonds, 45 N.Y.2d at 242 ("[u]njust enrichment, however, does not require the performance of any wrongful act by the one enriched. Innocent parties may frequently be unjustly enriched. What is required, generally, is that the party holding property under such circumstances that in equity and good conscience he ought not to retain it") (citations omitted); Tucker v. Scrushy, No. 02-5212, 2006 WL 37028, at *6 (Ala. Cir. Ct., Jan. 3, 2006) (executive acquitted of financial fraud in criminal trial still required to disgorge $48 million in excess compensation, noting "[r]estitution is permitted even when the defendant retaining the benefit is not a wrongdoer. Restitution serves to deprive the defendant of benefits that in equity and good conscience he ought not to keep, even though he may have

received those benefits honestly in the first instance, and even though the plaintiff may have suffered no demonstrable loses.") (quotations omitted); 1 Dan B. Dobbs, Law of Remedies §§ 2.1(3), 2.3 (2d ed. 1993) ("Equity is said to be flexible rather than rigid, its interest justice rather than law;" "[s]ubstantive equity could create an entirely new right, not recognized in the old law courts").

Lastly, Grasso cites Han v. Hertz Corp., 12 A.D.3d 195, 196 (1st Dep't 2004) for the proposition that "where no private right of action exists" under a statute, common law claims based on the statute will be dismissed as an effort to circumvent the preclusive effect of the statute. Grasso Br. at 29. The case illustrates the flaw in Grasso's argument. Unlike the plaintiff in Han, the Attorney General is not a private party, and unlike the statute at issue in Han, General Business Law ("GBL") § 396-z, there is no evidence that the N-PCL was enacted to preclude the Attorney General or other parties from asserting common law lawsuits against not-for-profit corporations.

Indeed, the Han Court did not explain the basis for its conclusion that GBL § 396-z precludes private parties from suing, but legislative history supported its finding, including a memorandum supporting the law from the then Attorney General: "Enforcement is the responsibility of the Attorney General." Letter from Robert Abrams, Attorney General, to Mario Cuomo,

Governor (Dec. 20, 1988), reprinted in Bill Jacket for ch.784 (1988).

C. Grasso Erroneously Relies on Federal Preemption Cases to Dispute the Attorney General's Parens Patriae Authority.

Grasso cites three federal preemption cases to argue that the Attorney General's authority to assert parens patriae actions under federal law is limited to those instances where "the Attorney General is among the parties authorized to enforce the statute as it is written." Grasso Br. at 27. This argument mischaracterizes federal law which permits state parens patriae actions to lie in the absence of express statutory authorization. See e.g., People v. Peter & John's Pump House, Inc. 914 F. Supp. 809, 811 (N.D.N.Y. 1996) (permitting state parens patriae action under 42 U.S.C. §§ 1981 and 2000a despite lack of express statutory authorization).

More important, Grasso's authority mixes apples and oranges, since in the federal arena, Congress often preempts state action in federal legislation. By contrast, there is no analogue to the federal Supremacy Clause under state law.

Thus, Grasso's citation (Br. at 27) to Connecticut v. Physicians Health Servs., 287 F.3d 110, 120 (2d Cir. 2002), is inapposite because that case addresses whether the State of Connecticut may assert a parens patriae action to prevent a

health provider from restricting reimbursement for certain drugs under § 1132 of the Employment Retirement Income Security Act of 1974 ("ERISA"). The Second Circuit denied Connecticut standing in light of "the broad preemptive scope of ERISA." 287 F.3d at 120. Notably, ERISA contains a direct bar on state action under 29 U.S.C. § 1144(a) (ERISA's provisions "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA). See California Division of Labor Standards Enforcement v. Dillingham, 519 U.S. 316, 324 (1997) (ERISA preemption is "clearly expansive").[19]

Grasso's reliance on Clearing House Ass'n, L.L.C. v. Spitzer, 394 F. Supp. 2d 620 (S.D.N.Y. 2005) is similarly misplaced. There, the New York Attorney General brought a parens patriae challenging the discriminatory lending practices of certain banks. The District Court denied standing in light of the broad preemptive sweep of the National Bank Act, 12 U.S.C. § 484(A), which states:

> No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice

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[19] Grasso's reliance on Pennsylvania v. New Jersey, 426 U.S. 660 (1976), is also inapposite as it concerns a denial of New Jersey's motion for leave to sue under Supreme Court Rule 17 to invoke the Court's original jurisdiction. The Court denied New Jersey leave to file independent taxpayer suits in parens patriae on the ground that if "this Court's original jurisdiction could be invoked to resolve what are, after all, suits to redress private grievances, our docket would be inundated." 426 U.S. at 665.

> or such as shall be, or have been exercised
> or directed by Congress . . . .

§ 484(A) (emphasis added). Given the District Court's finding that "a parens patriae action is a form of visitation [under Section 484(A)]," the Court denied standing in that case. 394 F. Supp. 2d at 627.

Grasso's remaining cases do not defeat the Attorney General's parens patriae authority in this case. In Abrams v. Seneci, 817 F.2d 1015 (2d Cir. 1987), Grasso Br. at 36, the Attorney General obtained a permanent injunction in state court against a firm selling entrepreneurial opportunities to consumers, barring the firm against future fraud and requiring restitution to all consumers injured by defendants' conduct. 817 F.2d at 1017. Dissatisfied with its state-court action, the Attorney General also commenced a federal RICO action seeking punitive treble damages against the same defendants for the same conduct. The district court dismissed the federal action, holding that although the State might have initially brought a RICO action as parens patriae, given the present posture, the money damages sought in the federal action "will not compensate the state for any harm done to its quasi-sovereign interests." 817 F.2d at 1017. In the present case, by contrast, there is no parallel federal action and the Attorney General is not seeking relief in excess of that necessary to recover funds that were paid to Grasso in violation of the N-PCL.

Similarly, Grasso relies on Vacco v. Operation Rescue National, 80 F.3d 64, 71 (2d Cir. 1996), Grasso Br. at 36-38, holding that money damages sought by the Attorney General on behalf of two victims of an illegal protest did not give rise to a quasi-sovereign interest of the State. By contrast, the purpose of this lawsuit is not to compensate any individual for its economic losses, but to ensure that the NYSE's assets are used for the public purposes authorized by the N-PCL and set forth in the NYSE's organizational documents.

Grasso's reliance on Matter of New York v. New York City Conciliation and Appeals Bd., 123 Misc. 2d 47 (Sup. Ct. N.Y. County 1984), Grasso Br. at 37, is also misplaced since the case involves an effort by the Attorney General to compel a City agency responsible for adjudicating rental complaints to construe certain complaints as demands for rent reductions, and to recall and reissue prior orders to include a rent reduction. 123 Misc. 2d at 48. Supreme Court held the Attorney General lacks a quasi-sovereign interest in directing a City agency how to adjudicate its complaints, and that the Attorney General could not step into the shoes of individual complainants to relitigate their rights. No analogy lies with the present case.

Lastly, Grasso cites a case from the Ulysses S. Grant administration, People v. The Albany and Susquehanna R.R. Co., 57 N.Y. 161 (1874), for the proposition that the Attorney General has no parens patriae authority to interfere with the internal

affairs of a private corporation. Grasso Br. at 40. But contrary case law from the twentieth century holds that corporations are creatures of the State, and where a corporation abuses its powers, "apart from any possible wrong to individuals, it is also a wrong against the State" at common law. Cortelle, 38 N.Y.2d at 87-88; see Matter of Cooperative Law Co., 198 N.Y. at 485-86 (private corporation's unwarranted practice of law warranted Attorney General's action because it presented "a controversy in which the People are vitally concerned.")

POINT III

THE FIRST, FOURTH, FIFTH AND SIXTH CAUSES OF ACTION EACH STATES A CLAIM

Grasso's perfunctory attempt to appeal Supreme Court's upholding of the State's first, fourth, fifth and sixth causes of action under C.P.L.R. 3211(a)(7) provides no basis to upset Supreme Court's determinations.

A. The First Cause of Action States a Claim.

The first cause of action asks the Court to impose a constructive trust[20] upon the unreasonable compensation received by Grasso, alleging:

> To the extent Grasso received unlawful, ultra vires payments because they were not reasonable compensation and not commensurate with the services he performed within the meaning of N-PCL §§ 202(a)(12) and 515(b), he has been unjustly enriched and cannot in equity and good conscience retain such payments.

(R. 281-282). The Attorney General has sufficiently alleged the elements of this claim.

As in his papers below, Grasso seeks to recast the State's straightforward claims for unjust enrichment and constructive trust into direct claims for ultra vires.[21] Grasso Br. at 41. The simple response below and on appeal is that any fair reading of the Complaint reveals that the Complaint seeks repayment

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[20] "[A] constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee." Simonds, 45 N.Y.2d at 241 (quoting Beatty v. Guggenheim Exploration Co., 255 N.Y. 380, 386 (1919)). As noted: "constructive trust doctrine is not rigidly limited," and "[a] court of equity in decreeing a constructive trust is bound by no unyielding formula. The equity of the transaction must shape the measure of relief." 45 N.Y.2d at 243 (quoting Beatty, 225 N.Y. at 389).

[21] The term ultra vires refers to corporate transactions that "involve adventures or undertakings outside and not within the scope or power given by their charters." Jemison v. The Citzens' Savings Bank of Jefferson Texas, 122 N.Y. 135, 140 (1890); see Lorisa Capital Corp. v. Gallo, 119 A.D.2d 99, 113 (2d Dep't 1986).

because Grasso's compensation was both "illegal" and "ultra vires," and ultra vires is alleged not as an independent cause of action but because it contributes to the equitable bases for imposing a constructive trust.

Grasso also asserts that because N-PCL § 203(a) provides a mechanism by which corporations may ratify ultra vires acts, the Attorney General is foreclosed from asserting that Grasso's compensation was ultra vires as a basis for its unjust enrichment claims. Grasso Br. at 41.

Supreme Court, however, recognized that N-PCL § 203(a) did not "abolish" the doctrine of ultra vires, and that the statute's terms do not even apply to the excessive compensation alleged in the Complaint. (R. 31-32). N-PCL § 203(a) provides:

> No act of a corporation and no transfer of real or personal property to or by a corporation, otherwise lawful, shall, if duly approved or authorized by a judge, court or administrative department or agency as required, be invalid by reason of the fact that the corporation was without capacity or power to do such act or to make or receive such transfer.

§ 203(a) (emphasis added). In the first instance, N-PCL § 203(a) does not apply here because Grasso's compensation is alleged to violate N-PCL §§ 202(a)(12), 515(b), 715(f) and 716. Thus, the alleged compensation is not "otherwise lawful."[22] Second, Grasso

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[22] Grasso's contention that the words "otherwise lawful" in N-PCL § 203(a) cannot take into account statutory violations because then the statute "would never apply" is absurd.
(continued...)

can not establish that his compensation was approved by "a judge, court or administrative department." N-PCL § 203(a). As pointed out by Supreme Court, Grasso's only authority on this point, Congregation Yetev Lev D'Satmar, Inc. v. 26 Adar N.B. Corp., 219 A.D.2d 186 (2d Dep't 1996), concerned a "lawful" sale of assets from one synagogue to another that was approved Supreme Court under N-PCL § 511 and Religious Corporations Law § 12. (R. 32). Accordingly, the first cause of action is not precluded by N-PCL § 203.

As a last resort, Grasso resurrects two cases, The Holmes & Griggs Mfg. Co. v. The Holmes & Wessell Metal Co., 127 N.Y. 252 (1891), and Fahey v. Ottenheimer, 219 A.D. 668 (1st Dep't 1927), for the proposition that under common law, payments made pursuant to an executed contract cannot be recovered no matter how illegal or improper. Grasso Br. at 42. Thus, ignoring the equitable basis of the claims against him, Grasso searches for arguments that will permit him to retain his compensation no matter how illegal.

Grasso, however, overlooks the obvious exception that contracts that are per se illegal or against public policy can be

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[22] (...continued)
Grasso Br. at 42. There are plenty of instances in which corporate acts may be ultra vires but not also violations of statutes, such as a corporation's failure to hold board meetings at the times specified in its certificate of incorporation. Presumably, N-PCL § 203(a) would apply in these situations to insulate corporate acts that are ultra vires, but "otherwise lawful." § 203(a).

unwound. Thus, Grasso's own Holmes & Griggs notes: "A corporation may not do acts which affect the public to its harm, inasmuch as they are per se illegal, or are malum prohibitum. Then no assent of stockholders can validate them." 127 N.Y. at 258 (citations omitted). Indeed, modern courts have recognized that courts have the equitable power to reach monies paid under lawful contracts if the payment is against law or public policy. See Simonds, 45 N.Y.2d at 238 (monies paid pursuant to a fully executed insurance contract held subject to constructive trust due to superior equitable claim by third party); Sheehan, 292 A.D.2d at 287 (financial benefits paid to corrections worker under collective bargaining agreement and statute subject to recoupment because of "strong public policy in favor protecting the public fisc and recovering moneys improperly or illegally paid out") (citations omitted).

B. The Fourth Cause of Action States a Claim

The Attorney General has set forth the elements of a claim for money had and received sufficient to overcome a motion to dismiss.

The elements for a claim for money had and received are set forth in 22A N.Y. Jur. 2d Contracts § 519 as: "(1) defendant received money belonging to plaintiff, (2) defendant benefited from receipt of the money, and (3) under principles of equity and

good conscience, defendant should not be permitted to keep the money". See Town of Bleeker v. Balje, 138 A.D. 706, 708 (3d Dep't 1910).

Grasso argues that because money had and received is a quasi-contract claim, it "cannot lie where there is a written contract between the two parties covering the same subject matter." Grasso Br. at 43.

However, very little of Grasso's sizable compensation was provided for under contract. The 1999 Employment Agreement ("1999 Agreement"), which covered the most egregious years of compensation (1999, 2000, 2001, 2002), provided only that Grasso will receive a guaranteed annual payment of $1.4 million. (R. 144). Under the 1999 Agreement, Grasso was also eligible to be considered for additional compensation under the Incentive Compensation Program ("ICP"), the Long Term Incentive Plan ("LTIP") and the Capital Accumulation Plan ("CAP"), but there is no actual promise to pay him any such compensation under the agreement. In fact, Section 3.10 of the 1999 Agreement provides: "There shall be no guaranteed amount of compensation payable to the Executive under the Annual ICP or the LTIP," and that the annual target ICP and LTIP shall be $1 million and $2.5 million, respectively. (R. 145-146).

Next, Grasso argues that the 2003 Employment Agreement expressly awards him specific compensation amounts and therefore cannot be attacked by the Attorney General under a quasi-contract

theory. Grasso Br. at 44. However, the 2003 Agreement did not award Grasso new compensation, but merely provided a mechanism for the accelerated payout of previously awarded retirement monies. Accordingly, the Attorney General is still free to challenge in a common law claim the improper award of excessive compensation even if such compensation was later distributed subject to a contract.

Over the course of the eight-year period during which Grasso was Chairman and CEO of the NYSE, the NYSE paid Grasso approximately $185 million. As noted above, however, only a small fraction of this money was actually provided for under Grasso's employment agreements. In August 2003, Grasso entered into an employment agreement that provided for the accelerated payment of approximately $140 million of the previously awarded amounts. However, the 2003 Employment Agreement did not award Grasso new monies, but merely permitted the accelerated payment of previously awarded amounts that were not otherwise due until his formal retirement.[23] Accordingly, the existence of the 2003 Agreement does not defeat equitable claims challenging the award

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[23] The State does not suggest that the Board's decision to accelerate Grasso's retirement pay was proper. For instance, NYSE directors were not informed that approximately $13.5 million of the accelerated payments were unvested and forfeitable. (R. 271). In addition, directors were not told that approximately $75 million of the accelerated payout derived from a plan that prohibited pre-retirement payouts except in cases of hardship. (R. 144, 195-196).

of excessive compensation. At a minimum, a question of fact exists as to whether Grasso's compensation was paid under contract.

In addition, each of the Grasso's three relevant employment agreements are subject to a quasi-contract challenge because they each contain language that: "[t]he provisions of this Agreement shall be construed and enforced in accordance with the laws of the state of New York".[24] (R. 211) (emphasis added). Thus, by reference to New York law, all compensation awarded under Grasso's Employment Agreement — by contract — had to be "reasonable" compensation "commensurate with services performed" under N-PCL §§ 202(a)(12), 515(b), 715, 716.

Here, the NYSE paid Grasso compensation that violated both law and contract. Accordingly, the claim of money had and received is appropriate because there is no contractual provision in any of Grasso's agreements that addresses the issue of how unlawful payments made in error under the contract are to be recovered. See Joseph Sternberg, Inc. v. Walber 36th Street Assocs., 187 A.D.2d 225, 228 (1st Dep't 1993) ("where the contract does not cover the dispute in issue, plaintiff may proceed upon a [quasi-contractual] theory of quantum meruit and will not be required to elect his or her remedies"); Banque Worms

[24] Grasso's other contracts contain a similar provision. See also 1995 Employment Agreement § 23 (R. 190); 1999 Employment Agreement § 14. (R. 159)

v. BankAmerican Int'l, 77 N.Y.2d 362, 366 (1991) ("[i]n the area of restitution, New York has long recognized the rule that if A pays money to B upon the erroneous assumption of the former that he is indebted to the latter, an action [for money had and received] may be maintained for its recovery") (citations omitted), further proceeding after certified question decided, 928 F.2d 538 (2d Cir. 1991); Citipostal, Inc. v. Unistar Leasing, 283 A.D.2d 916, 919 (4th Dep't 2001) (despite existence of lease agreements, improper payments were recoverable under money had and received where payments had been made in error under lease); Manufacturers Hanover Trust Co. v. Chemical Bank, 160 A.D.2d 113, 117-18 (1st Dep't 1990).

Lastly, citing Parsa v. State, 64 N.Y.2d 143 (1984), Grasso argues that in order to sustain a claim for money had and received, the plaintiff must demonstrate that defendant obtained the improper monies through "'oppression, imposition, extortion or deceit' or 'trespass.'" Grasso Br. at 16-17. In fact, Parsa merely refers to these terms as examples of misconduct that give rise to the equitable claim for money had and received. 64 N.Y.2d at 148 (citing Miller v. Schloss, 218 N.Y. 400, 408 (1916)) (citing oppression, imposition, extortion, deceit and trespass as possible grounds for such action); see also Maisel v. Schwartzbaum, 30 Misc. 2d 880, 883 (Sup. Ct. Kings County 1961) ("a wrongful taking, misappropriation or conversion is not necessarily a prerequisite to an action for moneys had and

received”); Town of Bleeker, 138 A.D. at 708-09 (“extortion, imposition, deceit or theft” are merely one of the grounds upon which money had and received may lie. Noting, “varied characters of claims on which an action for money had and received may be brought”).

C. The Fifth Cause of Action States a Claim.

The fifth cause of action alleges that “a majority of the entire board” did not approve Grasso’s compensation awards under Grasso’s CAP and Supplemental Executive Retirement Plan (“SERP”) and therefore such awards are voidable under N-PCL § 715. (R. 285-286). In addition, the fifth cause of action alleges that certain future payments that Grasso is now claiming are due to him under his 2003 Employment Agreement were not approved by “a majority of the entire board” and are likewise voidable. (R. 285-286).

N-PCL § 715 provides in relevant part:

> (e) Unless otherwise provided in the certificate of incorporation or the by-laws, the board shall have authority to fix the compensation of directors for services in any capacity.
>
> (f) The fixing of salaries of officers, if not done in or pursuant to the by-laws, shall require the affirmative vote of a majority of the entire board unless a higher proportion is set by the certificate of incorporation or by-laws.

Grasso argues that Supreme Court agreed with him that N-PCL § 715(f) does not extend to compensation, but only covers that portion of compensation denominated as salary.[25] Grasso Br. at 45. This is incorrect as Supreme Court merely noted that given the statute's literal text, "an argument can be made that § 715(f) does not apply to other compensation." (R. 34). Supreme Court did not actually rule on this point, likely because it recognized that Grasso's absurd construction would eviscerate the purpose of the law.

The Joint Legislative Committee to Study Revision of Corporation Laws, which drafted the language of § 715(f), stated in a 1970 report:

> Paragraph [715](e) follows the Bus. Corp. L. § 713(c) with respect to compensation to directors. Paragraph [715](f) is new; it is designed to impede siphoning of corporate funds to officers in guise of salaries.

(R. 221) (emphasis added). It is obvious that to adopt Grasso's narrow construction of "salary" would nullify the legislative purpose of safeguarding corporate assets, since under Grasso's reading, a corporation could simply circumvent the statute by denominating the bulk of officer compensation as bonus compensation instead of salary. See also People v. Santi, 3

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[25] Grasso does not seek to define the term "salary," and ignores the fact that the determination of what portions of his compensation were "salary" under the NYSE's compensation scheme presents a triable issue of fact that cannot be resolved on this motion.

N.Y.3d 234, 242 (2004) (courts "will not blindly apply the words of a statute to arrive at an unreasonable or absurd result") (quoting Williams v. Williams, 23 N.Y.2d 592, 599 (1969)).

Prior to the age of complex compensation packages designed by consultants, the term "salary" was essentially interchangeable with "compensation" and meant annual monies paid to full-time employees, at a rate which was usually set in advance of such service. See e.g., Godley v. Crandall & Godley Co., 212 N.Y. 121, 131 (1914) ("[d]oubtless the directors may appoint and fix the compensation of the ministerial officers of the corporation, but the payments of salaries to themselves as mere incidents of their office is a different matter") (emphasis added); Hopkins v. Cromwell, 89 A.D. 481, 482 (2d Dep't 1903) ("[b]roadly, the word 'salary' means a recompense or consideration made to a person for his pains or industry in another man's business. . . . [I]t carries with it the fundamental idea of compensation for services rendered"); Gallin v. National City Bank of N.Y., 152 Misc. 679, 704 (Sup. Ct. N.Y. County 1934) ("[c]oncedely the directors had the power expressly granted by the by-laws, to fix salaries, and that includes all forms of compensation for services") (emphasis added).

Grasso's arguments fail for two additional reasons. First, as noted by Supreme Court: "both N-PCL §§ 715(e) and (f) apply to this case, thereby mooting the issue." (R. 35). While § 715(f) governs compensation paid to officers, § 715(e) states the Board

of Directors shall fix the "compensation of directors for services in any capacity."[26] § 715(e) (emphasis added). However, the $185 million paid to Grasso was conferred in his roles as both director and officer, as each of the relevant employment agreements provides: "[d]uring the Employment Term, the Executive shall serve as the Chief Executive Officer of the Exchange and Chairman of the Board." (R. 143, 170, 193). None of the employment agreements attempts to apportion his compensation awards between his roles as officer and director. Accordingly, Supreme Court correctly held that Grasso's excessive compensation, awarded both as a director and an officer, was properly covered under N-PCL § 715.

Second, the NYSE's own Constitution during the relevant period required that "compensation" paid to directors and officers be approved by "affirmative vote of a majority of the entire Board." NYSE Const. ¶ 1161. Thus, even NYSE's Constitution recognized that the terms "salary" and "compensation" are interchangeable and that the Grasso's compensation as officer and director required affirmative majority approval of the Board.[27]

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[26] N-PCL § 708(d) includes the additional provision that board action under N-PCL § 715(e) requires a "vote of the majority of the directors present at the time of the vote, if a quorum is present at such time . . . ."

[27] Grasso's suggestion that recently proposed amendments to N-PCL § 715 prove by implication that the N-PCL in its (continued...)

D. The Sixth Cause of Action States a Claim.

The sixth cause of action alleges that while a director and officer of the NYSE, Grasso improperly received two improper interest-free loans from the NYSE: (1) $6,571,397 from the NYSE on or about May 11, 1995; and (2) $29,928,062 on or about May 3, 1999. (R. 268-287).

N-PCL § 716 states:

> No loans . . . shall be made by a corporation to its directors or officers . . .

Grasso argues that he is not bound by N-PCL § 716 because the NYSE is organized as a board of trade under N-PCL § 1410. Grasso Br. at 47. Boards of trade are ordinary Type A not-for-profit corporations, but under N-PCL § 1410(b), they are granted a few special powers, one of which is to:

> make loans to its members, directors or officers, or to any other corporation, firm, association . . . in any case where its board of directors finds that the making of such loan will be in furtherance of its corporate purposes and for a lawful public or quasi-public objective.

N-PCL § 1410(c)(2) (emphasis added).

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[27] (...continued)
current form immunizes Grasso for all acts carried out in "good faith" is folly. Grasso Br. at 10. The Senate and Assembly bills cited by Grasso would effect wholesale changes to executive compensation under the N-PCL, including conferring upon the Attorney General the same powers available to the Internal Revenue Service for recovering excessive compensation. (R. 66-80). Grasso's explanation for the Legislature's rejection of the bills is pure speculation.

There is no dispute that when the factual predicates of making a loan under N-PCL § 1410(c)(2) are satisfied, a board of trade, such as the NYSE, may extend loans to directors and officers. However, when the conditions of N-PCL § 1410(c)(2) are not satisfied, as in this case, boards of trade, like any other not-for-profit corporation, are subject to the prohibition against loans in N-PCL § 716.

Grasso takes the untenable position that N-PCL § 1410(c)(2) operates as a categorical exemption from N-PCL § 716 irrespective of whether § 1410(c)(2)'s requirements have been met. This argument flies in the face of the settled rule that where a statute provides for an exception to a general rule, "it is a fair inference that the Legislature intended that no other exception be attached by implication" and the "exception should be narrowly construed." Matter of Home Care Ass'n v. Dowling, 218 A.D.2d 126, 129 (3d Dep't 1996). Nothing in the language of § 716 indicates that boards of trade are excepted from § 716's scope.

Indeed, the N-PCL directly provides that where two provisions of the statute address the same subject matter, they should be harmonized, and later enactments should not be read as superseding earlier ones:

> [i]f any provision in articles one to thirteen inclusive of this chapter conflicts with a provision of any subsequent articles or of any special act under which a corporation to which this chapter applies is

> formed, the provision in such subsequent article or special act prevails. <u>A provision of any such subsequent article or special act relating to a matter referred to in articles one to thirteen inclusive and not in conflict therewith is supplemental and both shall apply</u>.

N-PCL § 103(c) (emphasis added); <u>see</u> Bjorkland, et al., <u>supra</u>, § 3-12(a), at 72.

Thus, N-PCL § 1410(c)(2) grants boards of trade the authority to make loans, but such authority only supersedes N-PCL § 716 when the conditions of N-PCL § 1410(c)(2) are actually satisfied. When, as here, a board of trade ignores the requirements of N-PCL § 1410(c)(2), the two provisions must be read as "supplemental" as required by N-PCL § 103(c).

The State and Grasso disagree as to whether the predicates of N-PCL § 1410(c)(2) have been met in this case, but the Court need not consider the issue since the inquiry into § 1410(c)(2)'s requirements is a question of fact that cannot be resolved on this appeal.

CONCLUSION

Accordingly, for all of the foregoing reasons, this Court should affirm Supreme Court's March 15, 2006, order, denying Grasso's motion to dismiss the first, fourth, fifth and sixth causes of action.

Dated: New York, New York
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CERTIFICATE OF COMPLIANCE

Pursuant to Appellate Division Rule 22 N.Y.C.R.R. § 670.10(d)(1)(i), I hereby certify that the foregoing brief was prepared on a computer (on a word processor). A monospaced typeface was used, as follows:

Name of Typeface: Courier New

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The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 13,518.

/s/ David Axinn

DAVID AXINN