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

PRESENT: HELEN E. FREEDMAN PART 39
Justice

HSBC USA INC. (f/k/a REPUBLIC NEW YORK CORPORATION) and REPUBLIC NEW YORK SECURITIES CORPORATION,

Plaintiff,

-v-

GULF INSURANCE CO, SHREWSBURY UNDERWRITING CAPITAL (BERMUDA) LIMITED, TRAVELERS CASUALTY AND SURETY CO. OF AMERICA, FEDERAL INSURANCE CO., and CONTINENTAL CASUALTY CO.,

INDEX NO. 603413/04

MOTION DATE

MOTION SEQ. NO. 005

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with accompanying memorandum decision.

Dated: November 27, 2006

Helen E. Freedman, *J.S.C.*

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 39

- -X

HSBC USA INC. (f/k/a REPUBLIC NEW YORK CORPORATION) and REPUBLIC NEW YORK SECURITIES CORPORATION,

Index No. 603413/04

Plaintiffs,

v.

GULF INSURANCE CO., SHREWSBURY UNDERWRITING CAPITAL (BERMUDA) LIMITED, TRAVELERS CASUALTY AND SURETY CO. OF AMERICA, FEDERAL INSURANCE CO., and CONTINENTAL CASUALTY CO.,

Defendants.

- -X

HELEN E. FREEDMAN, J.:

In this action under a fidelity bond, the plaintiff financial institutions seek to recoup a portion of $569 million that they paid to the victims of a fraud as part of a corporate guilty plea to felony violations of the federal securities and commodities laws. The defendant insurers move for summary judgment (CPLR 3212) dismissing the complaint on the grounds that (1) the underlying criminal conduct bars recovery as matter of public policy and under the terms of the bond, (2) the losses were not sustained by the plaintiffs but by the third-party victims, (3) one of the plaintiffs, HSBC USA Inc., is not an insured under the bond, (4) recovery is sought for excludable trading losses, (5) plaintiffs were aware of the losses before

the bond incepted, and (6) the claims are time-barred under the bond's two-year limitations period. For the following reasons, the motion is granted.

FACTS

The facts recited below are taken from the parties' respective Rule 19-a statements and counter-statements of material undisputed facts, the pleadings, and exhibits accompanying the parties' submissions.

The Prior Criminal Proceedings

Plaintiff Republic New York Securities Corporation ("RNYSC") was a registered broker/dealer which provided securities and futures brokerage services to individual and institutional clients. RNYSC was a wholly-owned subsidiary of Republic New York Corporation ("RNYC"). Plaintiff HSBC USA Inc. ("HSBC USA") entered into a merger with RNYC in 1999.

In or about March 1995, RNYSC began providing brokerage services to Martin Armstrong ("Armstrong"). Through a number of companies he owned and controlled, including Princeton Economics International, Ltd. and Princeton Global Management Ltd., Armstrong opened trading accounts at RNYSC in the names of entities known as special purpose vehicles ("SPVs") which were purportedly incorporated in the Turks and Caicos Islands. The investors in those SPVs were large foreign institutional

investors (the "Noteholders") who in turn received notes from the SPVs. The Princeton entities held legal title to the funds in the RNYSC accounts.

Through the Princeton entities, Armstrong exercised control over the disposition of the funds. Although he advised the Noteholders that most of the monies would be invested in United States Agency bonds and the like, Armstrong instead used the funds to make speculative trades in futures, commodities, currencies, and other financial instruments. Between March 1995 and August 1999, Armstrong incurred in excess of $550 million in net trading losses and costs. He operated a "Ponzi" scheme, using proceeds from the sale of new Princeton Notes to pay older Princeton Notes as they became due, and concealed the losses by continually transferring the funds among the SPV accounts. RNYSC ultimately received more than $35 million in commissions from Armstrong's trading activity.

Several RNYSC employees assisted Armstrong in continuing and concealing his activities. They included William H. Rogers ("Rogers"), President of the Futures Division, and Maria Toczlowski ("Toczlowski"), Vice President of Futures Trading, who both served as account representatives to Armstrong. At Armstrong's request, between November 1995 and July 1999 Rogers and Toczlowski issued more than 200 net asset value confirmation

letters ("NAV") that falsely represented to the investors the value of the assets in the SPV accounts.

Armstrong was assisted to a lesser extent by Joseph L. Calabrese, the Futures Desk Operations Manager at RNYSC, and James E. Sweeney, RNYSC's President and Chief Executive Officer. Calabrese allowed and enabled Armstrong to commingle funds in the accounts. Sweeney sent a letter which misleadingly stated that all of RNYSC's accounts were properly segregated, and falsely represented that Rogers had the authority to issue the NAV letters.

On December 7, 2001, RNYSC entered into a plea agreement (the "Plea Agreement") with the United States Attorney's Office (the "USAO") regarding the Princeton Notes Scheme. Specifically, RNYSC agreed to plead guilty to conspiring, in violation of 18 U.S.C. §371, to commit securities fraud in violation of 15 U.S.C. §§78j(b) and 78(ff) and 17 C.F.R. 240.10b-5, and commodities fraud in violation of 7 U.S.C. §6b. RNYSC also agreed to plead guilty to committing securities fraud as a principal in violation of 18 U.S.C. § 2, 15 U.S.C. §§78j(b) and 78(ff) and 17 C.F.R. 240.10b-5. The two count criminal information (the "Criminal

Information") filed in connection with the plea on December 17, 2001 alleged, in pertinent part, that

> [RNYSC] had sufficient information about the Princeton Notes to know that many of the actions in which [RNYSC] engaged, as set forth more fully below, operated as a fraud and deceit upon the Noteholders.
>
> * * *
>
> As [RNYSC] well knew, it had ample means of learning the identities of many of the Noteholders and obtaining copies of Princeton Note Agreements, notwithstanding Armstrong's refusals, yet deliberately and wilfully avoided discovering the terms of the Princeton Notes out of concern that such discoveries would likely have resulted in ending [RNYSC's] profitable relationship with Armstrong.
>
> * * *
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> As [RNYSC], the defendant, well knew or willfully avoided discovering, this restructuring [of Armstrong's accounts] substantially lessened [RNYSC's] credit exposure while dramatically increasing the credit risks of the Noteholders.
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> * * *
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> [RNYSC] was well aware of the losses arising from Armstrong's disastrous trading performance.
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> * * *
>
> In furtherance of the scheme, and in order to maintain its profitable relationship with Armstrong, [RNYSC] continued to execute such transfer instructions long after several senior officers of [RNYSC] came to understand that Armstrong was improperly using funds obtained from the sale of new Princeton Notes

> to pay principal and interest due on older Princeton Notes.

Similar findings appeared in a December 17, 2001 Securities and Exchange Commission order (the "SEC Order") revoking RNYSC's registration as a broker/deal. The SEC Order concluded that between 1995 and 1999, "Republic Securities, acting by and through its President, the President of its Futures Division . . . and other Futures Division personnel, was an active participant in and beneficiary of Armstrong's fraudulent scheme."

On December 17, 2001, an RNYSC representative authorized by the Board of Directors entered a plea of guilty on behalf of the corporation in the United States District Court for the Southern District of New York. Although RNYSC waived the reading of the Criminal Information, it agreed that the plea was proceeding under the information and that the corporation and its board had seen copies of it. When asked by the court if the corporation was "pleading guilty because it is, in fact, guilty," RNYSC's representative responded "That is correct, your Honor."

Under the terms of the Plea Agreement, the USAO and RNYSC stipulated, pursuant to 18 U.S.C. §3663(a)(3), to the appropriate amount to be paid to the victim Noteholders. The final amount that was to be paid was approximately $569 million. However, RNYSC's net capital at the time was only approximately $81

million. On December 7, 2001, the same date as RNYSC's plea agreement, the USAO and HSBC USA pursuant to which HSBC USA agreed to pay compensation to the victim Noteholders for the amount of restitution which exceeded the capital of RNYSC. The USAO agreed not to prosecute HSBC USA for any crimes related to the Princeton Notes Scheme.

On January 9, 2002, the District Court signed an order directing that restitution be made to the Noteholders (the "Restitution Order"). The Restitution Order recited that "the parties have agreed, pursuant to Title 18 United States Code, Section 3663(a)(3), that RNYSC shall make restitution in accordance with the terms of this Order for the purpose of compensating Noteholders and not as a fine or penalty." However, in an amended judgment issued on February 22, 2002, the sums payable were listed under the heading "CRIMINAL MONETARY PENALTIES" and the language of the judgment directed RNYSC to pay "criminal penalties." Additionally, in directing restitution the District Court referred to the payments as "punishment" and stated that "the sentence outlined in the plea agreement adequately reflects the seriousness of the offense and serves the purpose of specific and general deterrence."

The Fidelity Bond

A fidelity bond, Comprehensive Crime Bond No. 757/FB970427 (the "Bond") was issued to RNYSC for the period August 1, 1997 to August 1, 2000. The Bond was underwritten by certain Underwriters at Lloyd's, London, represented here by defendant Shrewsbury Underwriting Capital (Bermuda) Limited ("Shrewsbury"). Defendant Gulf Insurance Co. ("Gulf"), Travelers Casualty & Surety Co. of America ("Travelers Casualty"), Federal Insurance Co. ("Federal") and Continental Casualty Co. ("Continental") (collectively, the "Insurers") subscribed to the Bond. Under Section 1 of the Bond, the named assureds were identified as RNYC, Safra Republic Holdings S.A., Safrabank "and their respective subsidiary companies and/or management controlled entities as now existing or hereinafter constituted." The Bond has $100 million liability limit, with a $5 million deductible for RNYC and a $100,000 deductible fo RNYSC. The Bond was canceled (as to future liability) on January 1, 2000, the effective date of the HSBC USA/RNYC merger

The Bond is a fidelity bond which insures against, among other things, certain dishonest or fraudulent acts committed by an insured's employees. Specifically, it provides:

> The Underwriters, in consideration of an agreed premium . . . agree to indemnify the Assured for

* * *

FIDELITY

(A) Loss resulting directly from dishonest or fraudulent acts committed by an Employee acting alone or in collusion with others.

Such dishonest or fraudulent acts must be committed by the Employee with the intent:

(a) to cause the Assured to sustain such loss, or
(b) to obtain financial benefit for the Employee, or another person or entity.

Notwithstanding the foregoing however, it is agreed that with regard to Loans and Trading this bond covers only loss resulting directly from dishonest or fraudulent acts committed by an Employee with the intent to make and which results in a financial benefit

i) for the Employee, or
ii) another person or entity with whom the Employee committing the dishonest or fraudulent act was in collusion, provided that the Assured establishes that the Employee intended to participate in the financial benefit, or
iii) results in the intentional transfer or funds or Property to the benefit of an innocent third party, committed by the Employee in the knowledge that such third party was not lawfully entitled to such funds or Property, and which Property is not lawfully recoverable by the Assured.

As used throughout this Insuring Agreement, financial benefit does not include . . . any employee benefits earned in the normal course of employment, including salaries, commissions, fees, bonuses, promotions, awards, profit sharing or pensions, and the term "funds or Property" does not include any loan or transaction in the nature of or amounting to a loan or lease or an extension of credit.

The Bond also sets forth various exclusions. Except as specified in the section quoted above, the Bond does not cover "loss resulting directly or indirectly from trading." Nor does it cover "damages of any type for which the Assured is legally liable, except direct compensatory damages arising from a loss covered under this bond." The Bond further excludes "indirect or consequential loss of any nature."

The Bond states that it "shall be deemed terminated or canceled as to any Employee . . . as soon as any Assured, or any director or officer not in collusion with such person, shall learn of any dishonest or fraudulent act committed by such person at any time against the Assured or any other person or entity." Additionally, it provides that "[k]nowledge possessed or discovery made by any Assured shall constitute knowledge or discovery by all Assureds for all purposes of this bond."

Finally, the Bond contains a contractual statute of limitations. It provides that "[l]egal proceedings for the recovery of any loss hereunder shall not be brought prior to the expiration of 60 days after the original proof of loss is

filed with the Underwriters or after the expiration of 24 months from the discovery of such loss."

On June 4, 2002 RNYSC, and HSBC USA, as successor to RNYC, submitted a proof of loss (the "Proof of Loss") to the insurers seeking to recover the Bond limit of $100 million. The Proof of Loss stated that the loss was discovered in August 1999, and that plaintiffs' Risk Management/Insurance Department discovered the loss no later than August 30, 1999. Pursuant to a letter agreement dated November 18, 2003, the parties entered into the following understanding regarding plaintiffs' time to sue:

> The Insurers agree that the commencement of an action filed on or before June 30, 2004, will have the same effect as far as time limits are concerned as if it were filed on the date this letter is countersigned by you on behalf of the Assured . . . This agreement, however, is subject to express condition that the Assured agrees that: (1) all rights and defenses of the Insurers, whether at law, in equity or under the captioned Bond are to remain reserved, including, but not limited to, the Insurers' rights and defenses as to timing of (a) discovery, (b) notice or (d) proof of loss that existed prior to the effective date of the extension; and (2) except for the extension to June 30, 2004, provided herein, all of the Insurers' rights and defenses, whether at law, in equity or under the captioned Bond are understood by the Assured to be preserved . . .

Plaintiffs filed a complaint to recover under the Bond in the Limited States District Court for the Southern District of New York on May 12, 2004. On October 11, 2004, following the federal district court's dismissal of defendant Gulf for lack of diversity, plaintiffs filed this state court action against Gulf for its share the alleged loss. On June 7, 2005, this Court granted a motion to intervene by the remaining insurers, but stayed all proceedings until October 30, 2005 to permit the completion of discovery in the federal action. The instant motion for summary judgment followed.

DISCUSSION

The motion to dismiss is granted. Public policy bars a convicted corporate felon from seeking indemnity for the financial consequences of its criminal conduct, a rule which is substantially incorporated into the coverage terms and exclusions of the Bond. Furthermore, the suit is time-barred by the Bond's two-year contractual statute of limitations.

Criminality/Collateral Estoppel

RNYSC, in its corporate capacity, voluntarily pled guilty to willful and knowing participation as a principal and conspirator in a massive securities and commodities fraud. Even if the Bond contained no provisions prohibiting coverage for the insureds'

intentional, unlawful conduct, "the fundamental principle that no one shall be permitted to take advantage of his own wrong would import the limitation" (Messersmith v Amer. Fid. Co., 232 NY 161 [1921]). Simply put, "it is contrary to public policy to insure against liability arising directly against an insured from his violation of a criminal statute" (Litrenta v Republic Ins., 245 AD2d 344, 345 [2d Dept 1997]).

The rule applies with equal force where the offender is a corporation. Accordingly, indemnity pursuant to a fidelity bond was denied under similar circumstances in Drexel Burnham Lambert Group, Inc. v Vigilant Ins. Co., 157 Misc 2d 198, 595 NYS2d 999 (Sup Ct NY Co 1993), where the insured corporation's Board of Directors voted to ratify a plea agreement providing for conviction on six felony counts of mail and securities fraud:

> Indemnification from insurers for admitted criminal conduct cannot be permitted . . . . Hence, dismissal is warranted as to all claims arising from the transactions as to which Drexel has pleaded guilty, all claims for third-party indemnification premised on Drexel's willful acts . . . .

Drexel, supra at 1010 (emphasis supplied). Because plaintiffs do not dispute that their claims arise from the transactions underlying RNYSC's guilty plea, recovery under the Bond must be denied.

Plaintiffs attempt to minimize the consequence of RNYSC's criminal conviction by insisting that the corporation was held merely "vicariously liable" for the conduct of a few "rogue employees." But here, the liability was vicarious only in that all corporate liability is vicarious by virtue of an incorporeal entity's inability to act except through its employees. The key issue is whether the employees' conduct was of such a nature that it constituted wrongdoing by the corporation itself -- a fact conclusively established here by RNYSC's guilty plea.

The court is bound by the facts established by the criminal conviction for the purpose of determining civil liability. "A criminal conviction, whether by plea or after trial, is conclusive proof of its underlying facts in a subsequent civil action and collaterally estops a party from relitigating the issue" (Graves v DiStasio, 166 AD2d 261, 263 [1st Dept 1990]). All that matters is that "there be an identity of issues in the criminal and subsequent civil actions and that the defendant have had a full and fair opportunity to contest the issues raised in the criminal proceeding" (Id.) Plaintiffs cannot dispute RNYSC's direct liability for the Princeton Notes scheme because that identical issue was resolved in the federal criminal proceedings. Having voluntarily entered a guilty plea, the corporation cannot

argue that it did not have a full and fair opportunity to litigate the matter. Insofar as the plea acknowledged corporate, not individual, criminal intent and participation, RNYSC may not now claim otherwise:

> In the federal courts, a plea of guilty, if accepted, is an admission of all allegations charged in the indictment or information. Before a federal district judge can accept a plea of guilty, he must be satisfied that the defendant is voluntarily entering the plea of guilty with full understanding of the nature of the charges made in the indictment (or information), his available defenses and the consequences of such a plea. If a federal court is satisfied that a conviction is based upon a plea of guilty which was entered voluntarily and with knowledge of its consequences, either in a state or federal forum, then it will not permit a collateral attack on that conviction.
>
> * * *
>
> The reasoning which supports this rule is simply that when a person pleads guilty knowingly, he admits all of the non-jurisdictional facts contained in the indictment or information . . . .

U.S. v Warden of Green Haven Prison, 255 F Supp 33, 35-36 (SDNY 1966)(citations omitted); see also Ucar Intern. Inc. v Union Carbide Corp., 2004 WL 137073, at *15-16 (SDNY 2004) (plea of guilty by a criminal defendant is an admission of guilt of the substantive crime, as well as an admission to each of the elements charged); People v Thomas, 53 NY2d 338 [1981][plea of

guilty is an admission of factual guilt]).

As in Drexel, "the criminal information and [the corporation's] guilty plea make it clear that . . . corporate responsibility for criminal conduct was not merely vicarious" (Drexel, supra at 212). RNYSC's conviction establishes that the company possessed the requisite, independent *mens rea* from 1995 to 1999 to commit the crimes charged, and that it acted on its own behalf and for its own benefit in participating as a principal and conspirator through its employees. The evidence of corporate benefit is overwhelming, insofar as RNYSC admitted to receiving $35 million in commissions and fees and that Armstrong was one of its "largest and most profitable client relationships." Rather than dispute its corporate liability in this litigation, RNYSC should have raised the issue in the federal criminal proceedings: "If its guilt was merely passive, and its responsibilities arose only by virtue of *respondeat superior*, it could have entered a *nolo contendere* plea and disclaimed actual corporate responsibility in the allocution to the plea (Drexel, supra at 212; see Ucar, supra at *48-49 ["A criminal defendant wishing to avoid the collateral effect of a guilty plea, especially to prevent repercussions in future civil litigation from his or her admission of liability, may plead *nolo*

contendere"]).

In view of the preclusive effect of the guilty plea, it is unnecessary to consider at any length the parties' additional arguments regarding whether the criminal course of course of conduct at RNYSC was so pervasive and systematic so as to support a corporate conviction (see, People v Canadian Fur Trappers' Corp., 248 NY 159 [1928]; People v Hudson Valley Const. Co., 217 172 [1916]). Nor are the cases cited by plaintiffs on the issue of a corporate employee's "adverse interest" or "imputed knowledge" (Christopher S. v Douglaston Club, 275 AD2d 768 [2d Dept 2000]; Hall v Aetna Cas. & Sur. Co., 89 F2d 885 [1937]; Amer. Sur. Co. v Pauly, 170 US 133 [1898]) of any relevance given RNYSC admission of its own direct participation in and knowledge of the fraud. Neither Nat. Bank of Pakistan v Basham, 142 AD2d 532 (1st Dept 1988), aff'd 73 NY2d 1000 (1989), FDIC v Nat. Union Fire Ins. Co., 205 F3d 66 (2d Cir 2000) nor US v Demauro, 581 F3d 50 (2d Cir 1978) involved a corporate conviction corporation ratification or participation in the employee criminal conduct. Wight v BankAmerica Corp., 219 F3d 79 [2d Cir 2000] is inapplicable because the issue in that case was whether corporate liquidators who had entered a "unique guilty plea" on behalf of a bank could nonetheless pursue civil actions

against alleged co-conspirators where that option was expressly permitted by the terms of the plea agreement.

Coverage Under the Bond

Even if plaintiffs' claims were not barred by policy considerations, the terms of the contract between the parties bar relief. Fidelity bonds, such as the one here, require that the unfaithful employee intend to cause the employer a loss directly relating to the faithless act as would embezzlement or another type of theft from the employer, (Aetna Cas. & Sur. Co. v Kidder, Peabody & Co., 246 AD2d 202, 212-13 [1st Dep't 1998], app. denied, 93 NY2d 605 [1999]). An insured may not recover under a fidelity bond where its employees "did not steal *from* the company, [but] stole *for* the company" (Drexel, supra at 209). In this case, RNYSC's employees' participation in the Princeton Note scheme was intended to generate commissions for the corporation and preserve its client relationship with Armstrong. The fraud was perpetrated *for* the company, not directed against it. RNYSC's guilty plea is once again dispositive on this issue because it establishes not only that the employees' wrongdoing was committed to further the corporation's interests, but was in fact officially authorized to the extent that it represented the conduct of the corporation itself.

Plaintiffs nevertheless argue that (1) RNYSC's employees intended to harm the company because they knew their conduct would ultimately result in corporate liability for the Noteholder's losses and (2) RNYSC did not receive any profit from the illegal scheme but merely routine commissions and fees which were dwarfed by ultimate half-billion dollar penalty. Both arguments are without merit. First, although Armstrong sustained massive losses, his intent was to profit from the trading. RNYSC employees wanted his scheme to succeed. (See, e.g., Continental Bank, N.A. v Aetna Cas. & Sur. Co., 164 Misc2d 885, 888 [Sup Ct NY Co 1995]. Second, the allegedly "routine" nature of RNYSC's $35 million in commissions does not remove them from the category of profit, but only confirms that the employees intended the company to receive a benefit in the ordinary course of its business. The fact that RNYSC did not show any net profit after the imposition of penalties is irrelevant because it is a consequence that the employees endeavor to avoid rather than intend or expect.

The separate provision of the Bond requiring termination as to any employee upon discovery of his or her fraud or dishonesty also negates coverage. RNYSC admitted knowledge of its employees' misconduct between 1995 and 1999. Since the Bond

became effective in 1997, coverage regarding the Princeton Notes scheme never arose.

Exclusions

Plaintiffs' claims also fall within the exclusion for "indirect or consequential" losses. Fidelity bonds "do not purport to defend and indemnify the assured every time a claim is made against it because it may be responsible to others for the acts of its employees . . . [t]he loss covered is the loss to the insured, not the losses sustained by the outside world" (Drexel, supra at 209). Interpreting a substantially similar exclusion in Kidder, the Appellate Division, First Department held:

> Those terms in the fidelity bonds do not describe indirect and consequential injuries to the employer resulting from legal settlements with third parties who were the actual targets of the employee's acts. In this sense, the insureds' replacement of funds embezzled by the employee from a customer's separate personal bank account maintained by another institution was not a direct loss to the insureds/employer.

(Kidder, supra at 210)(citations omitted). The court concluded that to deem a third-party settlement a direct loss "would create the potential for almost any loss, not initially direct to the insured, to become a direct loss, a subterfuge that would render the exclusion . . . meaningless." (Id.)

Plaintiffs' contention that the funds were "held" by RNYSC and "misappropriated" from its accounts by the employees ignores the legal relationships between the parties and the nature of the transactions. The Noteholders did not establish accounts with RNYSC or otherwise become its customers. Rather, they gave funds to Armstrong to be invested through the PGM entities, which held legal title and exercised the ultimate control over their disposition. However wrongful or reckless, Armstrong's manipulation of the funds in the PGM accounts was not "misappropriation" of Noteholder funds held by RNYSC. Consequently, the RNYSC employees' assistance to Armstrong was not misappropriation from the corporation. Rather, as established by the criminal plea, it was participation in a securities and commodities fraud which resulted in indirect, consequential losses to RNYSC by virtue of the third-party settlements it was eventually compelled to make. Furthermore, even if what transpired could be construed as stealing from Noteholder accounts held by RNYSC, plaintiffs could not recover because of their own complicity in the theft.

Covered Parties

Although not a named assured, HSBC USA asserts its rights to claim a loss under the Bond as successor by merger to RNYC and

presumed assignee of the claim. The argument fails for several reasons. RNYC suffered no loss. It did not hold any of the funds lost by Armstrong and his entities, or maintain any accounts funded by the Noteholders. The losses were suffered by its subsidiary, RNYSC.

RNYC does not claim that it received assignment of RNYSC's claims. Even if it did, its rights would be at best derivative of those of its subsidiary. RNYSC had no covered claim and thus no rights to assign. Consequently, HSBC USA received nothing of value as assignee of RNYC.

Additionally, HSBC USA's liability arose from the non-prosecution agreement it entered in 2001. As such, it did not fall within coverage period of the Bond, which terminated in 2000 and was not renewed going forward. Moreover, that voluntary assumption of liability would not constitute a recoverable loss even if the Bond remained in effect.

Contractual Statute of Limitations

Plaintiffs' claims are also barred by the two-year statute of limitations set forth in the Bond. Accepting, arguendo, plaintiffs' claim that the loss was not discovered until August 1999, the time to sue expired in August 2001. This suit was not

plaintiffs' claim that the loss was not discovered until August 1999, the time to sue expired in August 2001. This suit was not commenced until 2004.

Plaintiffs contend that they could not have commenced the suit until after the proof of loss was filed and that the insurers' conduct estops them from invoking the limitations. Neither contention is viable. First, an extension of the time to file a proof of loss does not toll a contractual limitations period:

> [I]n New York, an insurance company's actions with respect to proof of loss and investigation of a claim pursuant to contract are so unrelated to the insurer's position towards the contract limitations period that no reasonable inference can be drawn regarding the latter solely from the former. Thus it makes no difference in this case that defendant continued its investigation and granted plaintiff extensions on filing proof of loss even after the limitations period had expired.

(Arkin-Medo Corp. v St. Paul Fire and Marine Ins. Co, 585 F Supp 11, 12 [EDNY 1982], aff'd 742 F2d 1430 [2d Cir 1983]); see Culinary Institute of Amer. v Aetna Cas. & Sur. Co., 151 AD2d 638 [2d Dept 1989]).

Second, plaintiffs have not met their burden of establishing that waiver or estoppel. "Waiver is an intentional

relinquishment of a known right" (Gilbert Frank Corp. v Fed. Ins. Co., 70 NY2d 966, 968 [1988]) and to establish estoppel, "plaintiff must offer evidence that it was misled or lulled by the defendant into failing to bring its claim in a timely manner" (Enterprise Eng'g, Inc. v Hartford Fire Ins. Co., 2004 WL 2997857, at *3 [SDNY 2004]). Neither is presumed lightly:

> In contrast to when an insured is promised repeatedly by agents for the insurer that the loss would be adjusted without litigation, steps taken by an insurer to investigate a claim do not constitute waiver or estoppel. Failure to respond to inquiries posed by plaintiff's counsel regarding the status of the investigation does not suggest that defendant misrepresented the status of the investigation or otherwise lulled plaintiff into inaction. An insurer has no duty to advise an insured of the limitations period. Evidence of communications or settlement negotiations between an insured and its insurer either before or after expiration of a limitations period contained in a policy is not, without more, sufficient to prove waiver or estoppel.

(North Amer. Foreign Trading Corp. v Mitsui Sumitomo Ins. USA, Inc., 2006 WL 3240529, at *3 [SDNY 2006] [quotations and citations omitted]). Furthermore, the conduct constituting a waiver or estoppel must occur withing the limitations period, as otherwise it cannot be said to have induced the insured's delay (Id.).

None of the conduct complained of constitutes estoppel or waiver. Plaintiffs have identified nothing more than the existence of ongoing settlement discussions, throughout which the insurers expressly reserved all their rights. The tolling agreement expressly reserved the insurers' right to invoke any defense and no representation was made that the claims were timely at the time the agreement was executed. To the contrary, the agreement clearly signaled they might be stale, guaranteeing only that a filing in 2004 would have "the same effect" as one filed at the time of the agreement. In any event, the agreement could not support an estoppel as a matter of law insofar as it was not executed within the limitations period.

Accordingly, it is

ORDERED, that the motion for summary judgment is granted, and it is further

ORDERED, that the complaint is dismissed in its entirety, and it is further

ORDERED, that the Clerk shall enter judgment accordingly.

Dated: November 27, 2006

ENTER:

Helen E. Freedman, J.S.C.