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

PRESENT: **Charles Edward Ramos** PART **53**

Index Number : 401620/2004

STATE OF NEW YORK

VS

GRASSO RICHARD A

Sequence Number : 017

COMPEL DISCLOSURE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Cross-Motion: ☐ Yes ☐ No

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

FILED
APR 11 2006
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 4/10/06

CHARLES E. RAMOS, J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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

Index No. 401620/04

Plaintiff,

-against-

RICHARD A. GRASSO, KENNETH G. LANGONE,
and THE NEW YORK STOCK EXCHANGE, Inc.,

Defendants.

----------X

RICHARD A. GRASSO,

Cross Claim Plaintiff,

-against-

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

Cross Claim Defendants.

----------X

RICHARD A. GRASSO,

Third-Party Plaintiff,

-against-

H. CARL McCALL,

Additional Third-Party Defendant.

----------X

Charles Edward Ramos, J.S.C.:

In motion sequence 017, third-party defendant H. Carl McCall moves to compel disclosure of drafts, notes and communications relating to the Webb Report and interview memoranda produced by defendant The New York Stock Exchange, Inc. ("NYSE"), in connection with the compilation of the Webb Report, and the re-examination of NYSE's general counsel, Richard Bernard, regarding his involvement in the drafting and/or editing of the Webb Report

(CPLR 3124).

In motion sequence 018, defendant Richard A. Grasso, moves by order to show cause to compel the re-examination of Richard Bernard and to compel the NYSE to produce legal memoranda provided to former NYSE Chairman John S. Reed relating to certain statements he made regarding the Webb Report.

Background

For a full recitation of the background in this action, see this Court's decision, dated March 15, 2006. The facts relevant to these motions are as follows: subsequent to defendant Grasso's resignation as CEO of the NYSE and Reed's appointment as Interim Chairman and CEO, the NYSE retained outside counsel, Daniel K. Webb, Esq., from the law firm of Winston & Strawn LLP, to conduct an investigation into the facts and circumstances surrounding Grasso's compensation and benefits.

Between September and December of 2003, Webb conducted more than sixty interviews with NYSE directors and employees, gathered documents and prepared memoranda summarizing the statements of these witnesses ("interview memoranda"). On December 15, 2003, a report (the "Webb Report"), was issued to the NYSE quoting, referencing and summarizing these interviews and documents, in addition to presenting conclusions regarding whether that compensation was reasonable and recommending reforms in the NYSE's compensation approval scheme.

On January 8, 2004, Reed referred the Webb Report to the Attorney General's office and the commencement of this action

ensued (*See* Exhibit 13, Letter from Interim NYSE Chairman Reed to NY Attorney General and Chairman of the SEC, annexed to McCall's Notice of Motion, "The view of the board is that the most appropriate action is to turn over the Webb Report .... to you [The Attorney General and SEC] ... we believe that you are more capable of pursuing the matter than the Exchange itself"). According to Bernard, "the Webb Report is now the equivalent of an internal NYAG or SEC investigation Report" (*See* Exhibit 12, Letter from Bernard to Deputy Counsel for the Attorney General and Chairman of the SEC).

This Court has since ordered disclosure of the Webb Report and certain interview memoranda.

According to McCall, in the course of depositions taken in this action, several deponents have disputed both the accuracy of the Webb Report and what was attributed to them in the disclosed interview memoranda relied upon to compile the Webb Report. During Bernard's deposition, he repeatedly invoked the attorney-client privilege as a basis not to testify, but did testify as to the accuracy of the Webb Report.

Two weeks after Bernard's deposition, the NYSE produced 251 pages of e-mails authored by Bernard. In one e-mail to Deputy Counsel to the Attorney General, Avi Schick, Bernard recalled a meeting held with Attorney General, Eliot Spitzer, where Bernard expressed his doubts as to the accuracy of the Webb Report (*See* Exhibit 10, annexed to McCall's Notice of Motion, "I then used the opportunity to convey to Eliot what the Webb Report omitted

because the unsworn testimony got Bob Michels & Co lies, spin and omissions of material facts"). Bernard separately wrote to Schick that it was within the Attorney General's discretion whether to distribute the Webb Report and the NYSE would not seek to control its distribution (*See* Exhibit 12, annexed to McCall's Notice of Motion).

In another such e-mail produced subsequent to Bernard's deposition where he testified that he had no involvement in the NYSE's settlement of claims against the NYSE's former director of human resources, Frank Ashen, who agreed to return $1.3 million in fees to the NYSE in connection with his role in Grasso's compensation, Bernard tells Schick to "unwrap the new hammer that we have presented to you" that resulted from "Frank's [Ashen] release ... [y]our new hammer should help Frank to be a very enthusiastic stool pigeon in testifying against Dick [Grasso] and Ken [Langone]" (*See* Exhibit H annexed to Grasso's Order to Show Cause").

Grasso joins in that part of McCall's motion which seeks the reexamination of Bernard on the ground that the NYSE's disclosure of highly relevant documents related to the inaccuracy of the Webb Report and the NYSE's settlement of claims against Ashen, authored by Bernard subsequent to his deposition deprived the non-NYSE defendants a fair opportunity to depose him.

McCall additionally seeks to compel disclosure of the drafts and the complete interview memoranda of the Webb Report on the ground that any applicable privilege has been waived by the

Report's release to the Attorney General and the SEC and where the NYSE has otherwise placed the accuracy and veracity of that Report at issue. McCall relies on the "implied waiver" or "fairness" doctrine as articulated in *In re Kidder Peabody Securities Litigation*, 168 FRD 459 [SDNY 1996], referred to as the "at issue" doctrine, in the First Department.

Discussion

The First Department has explicitly held that the privileges that attach to protect attorney-client communications and attorney work product may be waived if the holder of that privilege places the protected communications "at issue" in the litigation (*See Drizin v Sprint Corp.*, 3 AD3d 388, 389-390 [1st Dept 2004]; *G.D. Searle & Co., Inc. v Pennie & Edmonds LLP*, 308 AD2d 404, 404 [1st Dept 2003]).

In *Kidder Peabody*, the court considered the implied waiver of attorney-client and work product privileges as to draft documents and interview notes drafted by outside counsel retained to investigate allegations of fraud by one of the firm's traders and culminating in the compilation of a report summarizing the facts surrounding the allegations and containing edited portions of the interview documents (*In re Kidder Peabody's Securities Litigation*, supra, 168 FRD 459, 468 [SDNY 1996]). The firm subsequently released the report to the public, the SEC and the US Attorney's Office.

Applying the so-called "fairness" or "implied waiver" doctrine, the court determined that the firm waived the attorney

client privilege as to the drafts of the report by the firm's affirmative use of the protected information and "repeated injection of the substance of the report" into the litigation (*Id*). According to the court, that "affirmative use" included repeated factual assertions regarding the veracity of the substance contained in the report such that fairness demanded the full examination of communications and drafts underlying it to determine whether these assertions were correct or risk depriving the opposition access to information vital to her defense (*Id*).

Here, the NYSE disclosed the Webb Report to the SEC and the Attorney General, thereby waiving any assertion of the attorney client privilege as to the Report itself. Further, as in *Kidder Peabody*, the NYSE has repeatedly referenced the Webb Report as reliable authority for the underlying factual assertions it contains establishing Grasso's wrongdoing in connection with his receipt of compensation, thereby placing its veracity "at issue" in this litigation (*See* Exhibit 13, annexed to McCall's Notice of Motion, Letter from Interim NYSE Chairman and CEO Reed to NY Attorney General and Chairman of the SEC, "The board has discussed the [Webb] Report's findings and agree that serious damage has been inflicted on the Exchange"). Additionally, Reed was quoted in *The New York Times* expressing the opinion that the Webb Report proved that the NYSE had meritorious claims against Grasso, now the basis of a cross-claim against him and the NYSE for defamation.

Moreover, as was the case in *Kidder Peabody*, disclosure of

the Webb Report to the Attorney General and the SEC was deliberately done, in part, to obtain more favorable treatment from these regulatory entities amidst growing assertions of wrongdoing stemming from the NYSE board's alleged approval of Grasso's compensation (*See* Exhibit 13, annexed to McCall's Notice of Motion, Letter from Interim NYSE Chairman and CEO Reed to NY Attorney General and Chairman of the SEC, "The Board [of the NYSE] ... instructed me to send you what we have come to call the Webb Report ... [W]e [the NYSE] assure you that we will participate or cooperate in any way that is appropriate; *see also In re Kidder Peabody's Securities Litigation*, *supra*, 168 FRD at 472, "[W]hen a corporation provides an otherwise privileged internal investigative report to the SEC as part of an effort to obtain more favorable treatment, it waives the privilege both for the report and for those underlying documents necessary for the Commission to evaluate the reliability and accuracy of the report"; *see also In re Grand Jury Proceedings*, 219 F3d 175, 184 [2nd Cir 2000], [T]he corporation waiving the privilege made a deliberate decision to disclose privileged materials in a forum where disclosure was voluntary and calculated to benefit the disclosing party").

The Court would agree with the NYSE that the underlying draft documents of the Webb Report would be protected by the attorney client privilege *but for* the NYSE's affirmative disclosure and use of the Webb Report in such a way that places its accuracy at issue, effectively forfeiting that privilege.

The same analysis applies here to assertions of work product privilege as to the underlying drafts of the Webb Report and notes used to compile the interview memoranda. The First Department recognizes that waiver of the protections afforded to attorney work product can be predicated upon a party's affirmative use of selected portions of those materials in litigation (*Drizin, supra*, 3 AD3d at 389-390). As the Court of Appeals articulated, privileges, while important, are not absolute and may be deemed waived where a party affirmatively places purportedly privileged information or conduct at issue (*Green v Montgomery*, 95 NY2d 693, 699 [2001]).

Here, the NYSE has selectively asserted the attorney client and work product privileges while simultaneously propounding the message that the Webb Report is factually reliable in several important arenas, including to key regulatory authorities. In such a situation, it would be fundamentally unfair to uphold the NYSE's assertion of privilege as to the underlying draft documents of the Webb Report which may deprive the non-NYSE defendants from litigating the truth of the Webb Report's findings, which *has* become central in this action (*See In re Grand Jury Proceedings, supra*, 219 F3d at 185, "[T]he implied waiver analysis should be guided by fairness principles").

As for the reexamination of Bernard, the court is dismayed by the tactic that gave rise to the disclosure of highly relevant documents authored by Bernard *subsequent* to the completion of his deposition, directly addressing topics upon which he repeatedly

invoked the attorney-client privilege as a basis not to respond. Bernard's e-mail to Schick where he recalls a conversation with Spitzer and referred to the Webb Report as containing "lies, spin and omissions of material facts", in light of his sworn testimony that in his view the Webb Report was accurate, necessarily undercuts any expectation of confidentiality Bernard could have asserted as to his view of the Webb Report. Further, it buttresses the view that the non-NYSE defendants have not been afforded an adequate opportunity to conduct discovery, at least with respect to Bernard, that might otherwise detract from any need to continue examining him.

Accordingly, for the reasons stated above, fairness here dictates that the privileges be invaded thereby entitling the non-NYSE defendants to view the underlying factual material contained in drafts, notes and interview memoranda of the Webb Report, necessary to evaluate the veracity of the representations contained in therein.

Accordingly, it is

ORDERED that McCall's motion to compel discovery is granted to the limited extent that drafts and interview memoranda of the Webb Report are sought and denied as to any legal memoranda drafted in conjunction with the Webb Report; and it is further

ORDERED that McCall's and Grasso's motion to compel discovery is granted to the limited extent that the NYSE shall produce Bernard to be reexamined concerning his role in the preparation of the Webb Report and as to his role in the

settlement of the NYSE's claims against Frank Ashen; and it is further

ORDERED that Grasso's motion to compel production of legal memoranda provided by the NYSE to Reed is denied for the reasons stated on the record.

Dated: April 10, 2006

J.S.C.

CHARLES E. RAMOS J.S.C.

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