



February 24, 2006

VIA EMAIL TRANSMISSION;
CONFIRMATION BY OVERNIGHT MAIL

Ms. Nancy M. Morris
Secretary
Securities & Exchange Commission
Station Place
100 F. Street, N.E.
Washington, D.C. 20549-9303

Re: Response of Pacific Exchange, Inc., to Comments on Proposed NYSE Merger
Release No. 34-53077; File No. SR-PCX-2005-134
Release No. 34-53073; File No. SR-NYSE-2005-77

Dear Madam Secretary:

The Pacific Exchange, Inc., (“PCX”) hereby submits its response to the February 22, 2006 comment letter received by the Securities and Exchange Commission (“Commission”) by Mr. Fane Lozman (“Mr. Lozman”) in connection with the PCX and New York Stock Exchange, Inc. (“NYSE”) rule filings (“Rule Filings”) concerning the merger announced by NYSE and Archipelago Holdings, Inc. (“Archipelago”) on April 20, 2005.¹ PCX is a wholly owned subsidiary of Archipelago, which operates the Archipelago Exchange.

In his letter, Mr. Lozman attacks the letter submitted by PCX (“PCX Letter”) in connection with the Rule Filings.² Specifically, Mr. Lozman states that the PCX Letter misrepresents the judgment entered by Judge Allen S. Goldberg on July 25, 2005, in the case captioned Lozman, et al. v. Putnam, et al., Circuit Court of Cook County, IL, No. 01 L 16377 (consolidated with 99 CH 1134). Judge Goldberg’s 28-page opinion is publicly available in the

¹ Release No. 34-53077; File No. SR-PCX-2005-134 (January 9, 2006); Release No. 34-53073; File No. SR NYSE-2005-77 (January 6, 2006).

² Letter from the Pacific Exchange, Inc., dated February 8, 2006, a copy of which is attached hereto.



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court file and was submitted to the Commission by way of a separate comment letter in response to the Rule Filings.³ A further copy of the opinion is attached to this letter.

In August 1999, Mr. Lozman filed suit against defendants Gerald Putnam, Terra Nova Trading, L.L.C. and several other defendants, including (at the time, the privately-held) Archipelago. Mr. Lozman alleged various legal and equitable claims against the defendants involving a private business dispute arising from the mid-1990s. Archipelago was dismissed very early in the case and all the other defendants were dismissed over the next several years, save for defendants Mr. Putnam and Terra Nova Trading, L.L.C. Mr. Lozman appealed the dismissal of Archipelago, but ultimately lost.

Over the course of six weeks in November and December 2004, Mr. Lozman prosecuted his case before a jury against the two remaining defendants, Mr. Putnam and Terra Nova Trading, L.L.C. Judge Goldberg presided over the trial. At the conclusion of the trial, the jury entered a binding verdict in favor of the defendants on all legal counts and Judge Goldberg entered judgment on the jury verdict soon thereafter. After extensive legal briefing and oral argument before Judge Goldberg during the first half of 2005, the judge entered a final judgment in favor of the defendants on all equitable counts. That judgment is memorialized in Judge Goldberg's 28-page opinion referenced above. Thus, at the conclusion of both the legal and equitable phases of the trial in Lozman, et al. v. Putnam, et al., Judge Goldberg found in favor of the defendants assessing no liability against them on all counts and awarded no damages to Mr. Lozman.

Mr. Lozman selectively attaches to his February 22, 2006 letter an advisory and non-binding verdict that was provided to Judge Goldberg by the jury at the conclusion of the jury trial advising the judge of an equitable usurpation by the defendants. What Mr. Lozman fails to point out in his letter is that Judge Goldberg evaluated this advisory and non-binding verdict and, for the reasons set forth in his 28-page opinion, entered judgment in favor of the defendants on all equitable counts, including the usurpation count. And, that is why Mr. Lozman today is petitioning Judge Goldberg to undo the judgments entered by him; because Mr. Putnam was "exonerated on all counts and judgment was entered" in his favor.

As for the residual attacks made by Mr. Lozman in his letter, we believe them to be irrelevant and off base and, thus, not worthy of response.

³ Letter from James L. Kopecky of James L. Kopecky, P.C., dated January 16, 2006; *see also*, Letter from Philip J. Nathanson of Philip J. Nathanson & Associates, dated February 2, 2006.

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On behalf of the Pacific Exchange, Inc., and its parent, Archipelago Holdings, Inc., we would like to thank you for the opportunity to respond to the Letters. If you have any questions, please contact me at your earliest convenience.

Very truly yours,

A handwritten signature in black ink that reads "Kevin J. P. O'Hara". The signature is written in a cursive, somewhat stylized font.

Kevin J. P. O'Hara
Chief Administrative Officer,
General Counsel & Secretary

cc: Chairman Christopher Cox
Commissioner Paul S. Atkins
Commissioner Roel C. Campos
Commissioner Cynthia A. Glassman
Commissioner Annette L. Nazareth

Mr. Robert L.D. Colby



February 8, 2006

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Re: Response of Pacific Exchange, Inc., to Comments on Proposed NYSE Merger
Release No. 34-53077; File No. SR-PCX-2005-134

Dear Madam Secretary:

The Pacific Exchange, Inc., (“PCX”) hereby submits its response to comment letters received by the Securities and Exchange Commission (“SEC” or “Commission”) in connection with PCX’s rule filing (“Rule Filing”) – File No. SR-PCX-2005-134.¹ PCX is a wholly owned subsidiary of Archipelago Holdings, Inc., (“Archipelago”) which operates the Archipelago Exchange (“ArcaEx”) and executes trades in NYSE-listed, PCX-listed, and OTC equity securities, ETFs, and options. PCX is a self-regulatory organization and is registered as a national securities exchange.

This submission is in response to two letters received by the Commission in connection with the Rule Filing,² and a third letter received by the Commission, which was submitted in connection with a rule filing made by the New York Stock Exchange, Inc. (“NYSE”)(File No. SR-NYSE-2005-77).³ Hereinafter the three comment letters will be referred to as “the Letters.”

¹ Exchange Act Release No. 34-53077 (January 6, 2006).

² Letter from James L. Kopecky of James L. Kopecky, P.C., dated January 16, 2006; and, letter from Philip J. Nathanson of Philip J. Nathanson & Associates, dated February 2, 2006.

³ Exchange Act Release No. 34-53088 (January 6, 2006); Letter from Michael Kanovitz of Loevy & Loevy, dated February 2, 2006.



On April 20, 2005, the NYSE and Archipelago publicly announced their intention to merge. In connection with the announced merger, the Commission staff has diligently worked with Archipelago and the PCX to address certain corporate and regulatory governance issues that arise out of and are impacted by the proposed merger. The subject of the Rule Filing, in large part, focuses on these governance issues and the associated changes undertaken by Archipelago and PCX in connection therewith.

The Letters have nary to do with the subject of the Rule Filing. Instead, they attack the character and question the integrity of Mr. Gerald D. Putnam (“Mr. Putnam”). Mr. Putnam was a co-founder of Archipelago and currently serves as its chairman and chief executive officer. He also serves as the Chairman of the PCX. Upon consummation of Archipelago’s merger with the NYSE, Mr. Putnam has been named to serve as a co-president and chief operating officer of NYSE Group, Inc., a newly-formed holding company which will be publicly traded on the NYSE.

The attacks stem from two private disputes involving former business ventures in the 1990s. The disputes, which were filed in 1999 and 2000, respectively, are currently being litigated in Illinois state court. In one dispute, after a 6-week trial in 2004, the jury and the judge exonerated Mr. Putnam on all counts and judgment was entered for Mr. Putnam on July 25, 2005.⁴ The plaintiffs are now engaging in post-judgment process in an attempt to undo the decision of the judge and the jury. The second dispute, which was settled in 1998 and where the plaintiff is now attempting to re-open the settlement, is currently in discovery phase.⁵ Mr. Putnam denies any liability. Also, in both disputes, the plaintiffs initially named Archipelago (or its predecessor entity) as a defendant; and, in both disputes, Archipelago was expeditiously dismissed with prejudice. The Letters merely represent the most recent paroxysm outside of the courtroom by these plaintiffs in an attempt to harass and embarrass Mr. Putnam.

Mr. Putnam has been associated with the securities industry since graduating from the University of Pennsylvania in the early 1980s. Since joining the industry, he has held licenses and/or been regulated in several capacities at one time or another by the SEC, NYSE, NASD and PCX. In the mid-1990s, Mr. Putnam co-founded the Archipelago ECN, one of the first qualified ECNs. Along with other ECNs and marketplace entrepreneurs, the trading of equity securities in the United States was revolutionized; and the ripple effects of that revolution have impacted and continue to impact the options and futures trading businesses as well. The fruits of this revolution are very tangible: U.S. capital markets are more transparent, efficient, and globally competitive, and provide better trade executions for all investors.

⁴ See *Lozman, et al. v. Putnam, et al.*, Circuit Court of Cook County, IL, No. 01 L 16377 consolidated with 99 CH 11347.

⁵ See *Borsellino, et al. v. Putnam, et al.*, Circuit Court of Cook County, IL, No. 00 CH 13958.

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In 2004, Mr. Putnam guided Archipelago through an initial public offering, which was the first IPO of an equities marketplace in the United States. As noted above, Mr. Putnam serves as the chairman and chief executive officer of the publicly traded Archipelago (PCX:AX), whose board of directors includes, among others, a former SEC chairman. Additionally, Mr. Putnam has sat on the board of directors of the PCX, a heavily regulated self-regulatory organization, since 2000, and with the merger of Archipelago and PCX in September 2005, now serves as its chairman. Since co-founding Archipelago, Mr. Putnam has regularly engaged and interacted with SEC staff and Commissioners on a myriad of subjects and issues.

On April 20, 2005, the NYSE and Archipelago publicly announced their intention to merge. As part of that plan, Mr. Putnam will serve as a co-president and chief operating officer of NYSE Group, Inc. The Letters, and the private disputes underlying them, have no bearing on Mr. Putnam's fitness to serve in those roles. Given his many years of service in the highly-regulated securities industry, Mr. Putnam has a very public record that underscores his integrity and ability to properly discharge his duties and responsibilities as an officer of NYSE Group, Inc.

On behalf of the Pacific Exchange, Inc., and its parent, Archipelago Holdings, Inc., we would like to thank you for the opportunity to respond to the Letters. If you have any questions, please contact me at your earliest convenience.

Very truly yours,

Kevin J. P. O'Hara
Chief Administrative Officer,
General Counsel & Secretary

cc: Chairman Christopher Cox
Commissioner Paul S. Atkins
Commissioner Roel C. Campos
Commissioner Cynthia A. Glassman
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also found that the release was valid and equitable.

ANALYSIS

This Court will consider the following legal and equitable issues: (1) whether the jury's answers to the special interrogatories are a special verdict that binds this Court, (2) whether there was a usurpation of corporate opportunity, (3) whether the release is valid, (4) whether the release was ratified, (5) whether the release was cancelled or rescinded, (6) whether laches bars Plaintiffs' claim, and (7) whether there was preemption.

Special Interrogatories

We ruled in our order issued on November 16, 2004 that any jury findings to the equitable claims are only advisory. However, when equitable claims are determined by common issues of facts that impact the legal claims, this Court must abide by those findings. In Boatman's National Bank v. Ward, 231 Ill. App. 3d 401, the appellate court found that the circuit court erroneously disregarded the jury's verdict by deciding the fiduciary duty question independently. Id. at 410. Therefore, under Boatman's National Bank, 231 Ill. App. 3d 401, when ruling on the equitable issues, we are bound by the jury's findings on common issues of fact pertaining to the written and oral contract counts. For the purposes of analyzing the equitable issues of corporate usurpation, laches, reformation, unjust enrichment, rescission, and cancellation, we had no need to use the Boatman's National Bank 231 Ill. App. 3d 401 standard over Plaintiffs' claims or Defendants' affirmative defenses. We are bound by the jury's general verdict as to the contract counts and answers to the special interrogatory in analyzing the legal issues of release, ratification, and declaratory judgment counterclaim. The affirmative defense of

preemption is legal in nature, but will be decided by this Court as a matter of law.

Usurpation of Corporate Opportunity

Counts II and IV of Plaintiffs' Second Amended Complaint concerns usurpation of a corporate opportunity by Jerry Putnam, Terra Nova Trading, and GDP. Plaintiffs claim that Defendants usurped opportunities to: (1) run a SOES trading room; (2) develop and operate an electronic communication network; (3) develop and operate an electronic stock exchange, and (4) operate a broker-dealer business. (Defs. ['] Instruc. No. 4-A).

Legal Standard

In order to recover under the claim, Plaintiffs must prove the following: (1) that one or more Defendants had a fiduciary duty to BWP; (2) that Defendant used an asset of BWP that was used in another business not involving BWP, or that Defendant breached his fiduciary duties by entering into a business that is reasonably incident to the present or prospective business operations of BWP without first disclosing and tendering a corporate opportunity to BWP; and (3) the value of the opportunity that was allegedly usurped. *Id.* The burden is on BlueWater Partners to prove that elements one and two are more probably true than not true, and that element three is proven by clear and convincing evidence. (Defs. ['] Instruc. No. 4-A).

Under Boatman's National Bank, 231 Ill. App. 3d 401, we are bound by the jury's verdict on Plaintiffs' Count 20. The jury found that Defendant Putnam did not breach an oral agreement

to deliver an ownership interest in Terra Nova. However, this Court agrees with the jury's answer to the special interrogatory that Putnam usurped a corporate opportunity from Plaintiffs. But our finding on the usurpation claim is not affected by the Jury's verdict on Count 20, because whether Defendants usurped a corporate opportunity does not hinge upon whether Plaintiffs were promised ownership in Terra Nova. Even if no such promise existed, it is possible that Defendants inappropriately usurped BlueWater Partner's corporate opportunity.

Fiduciary Duty Owed to BlueWater Partners

Corporate officers owe a fiduciary duty of loyalty to their corporate employer not to: (1) actively exploit their positions within the corporation for their own personal benefit, or (2) hinder the ability of a corporation to continue the business for which it was developed. The resignation of an officer will not sever liability for transactions completed after the termination of the party's association with the corporation of transactions which began during the existence of the relationship, or were founded on information acquired during the relationship.

(Pl.['s] Instruc. No. 21), Veco Corp. v. Babcock, 243 Ill. App. 3d 153, 160-61 (1st Dist. 1993), Rexford Rand Corp. v. Ancel, 58 F.3d 1215, 1218-19 (7th Cir. 1995), Hagshenas v. Gaylord, 199 Ill. App. 3d 60 (2d Dist. 1990), Graham v. Mimms, 111 Ill. App. 3d 751, 760-61 (1st Dist. 1982).

In their case-in-chief, Plaintiffs provided evidence that Defendant Gerald Putnam had a fiduciary duty to Plaintiffs as an officer, director, and shareholder of Blue Water Partners. As officers, directors, and shareholders of BlueWater, both Plaintiff Lozman and Defendant Putnam were fiduciaries of BlueWater. See Hagshenas v. Gaylord, 199 Ill. App. 3d 60, 71, 557 N.E.2d 316, 323 (2d Dist. 1990).

Business Assets of BlueWater Partners

We agree with the jury's finding because circumstantial evidence was provided to show that Defendant Putnam used corporate assets, namely, his time as an officer and the office space of Blue Water Partners, to establish Terra Nova Trading. Because BlueWater Partners was still in the primary stages of its development as a company, we believe that its relationship with Townsend Analytics was also a valuable asset used to establish Terra Nova Trading. It was Plaintiff Lozman who had introduced the Townsends to Defendant Putnam.

Broker-Dealer is Reasonably Incident to BlueWater Partners

Both Plaintiff Lozman and Defendant Putnam testified that they would market ScanShift to traders through BlueWater free of charge, but money from licensing would be routed through Terra Nova. Further testimony and business filings show that there was doubt whether BlueWater Partners could have engaged in software licensing without a broker-dealer license. Defendant Putnam approached Foley & Lardner to incorporate BlueWater Partners, to which he and Defendant Lozman would be directors and shareholders. Mr. George Simon, the principal billing partner for the broker-dealer regulation section, assigned Mr. Edward Mason to undertake the day-to-day transactions for BlueWater Partners. To organize BlueWater Partners, on April 5, 1994, Defendant Putnam filed an SS-4 federal employer identification form, on which he stated the principal activity of BlueWater Partners was a "securities broker-dealer providing broker-dealer services." On October 28, 1994, Defendant Putnam filed with the Illinois Department of Employment Security an unemployment liability form that the primary business activity of

BlueWater Partners was in "providing securities broker-dealer services to financial institutions." (Tr. of 11/22/04 p.m. at 80). Also dated October 28, 1994, Plaintiff Putnam filed the Illinois Business Registration Form with the Illinois Department of Revenue a NUC-1, a tax form filed with the State in connection with the organization of a business. Id. at 83, Pls. ['] Ex. 15. Although Plaintiff Putnam disputes that he failed to properly read the stated principal activity on the form and simply signed as instructed by Mr. Mason's paralegal, Ms. Maggie Zlobin, we find Mr. Mason's testimony credible that through its standard practice, Foley and Lardner "works with the client to include language in this form." (Tr. of 11/22/04 p.m. at 68). More evidence shows the doubt over whether BlueWater should have been a registered broker-dealer, because Mr. Mason had noted talking points in the corporate minute book. He planned to use the talking points to speak to Ms. Belinda Blair at the Securities and Exchange Commission (SEC) to advocate on behalf of BlueWater Partners that it should not be treated as a broker-dealer because it was not performing execution services. He planned to advocate that BlueWater was merely acting as a licensor of software for the main purpose of realizing the economic value of licensing. Id. at 108. The goal, Mr. Mason testified, was to avoid registering BlueWater Partners as a broker-dealer. Id. at 109. Assessing all the evidence brought forth from both parties, we find that BlueWater Partners could have operated as a broker-dealer simply by applying for a broker-dealer license.

The ambiguity of whether BlueWater Partners should have been regulated by the SEC over its innovative business structure does not preclude Terra Nova from falling within a category of business that is reasonably incident to BlueWater Partners. Terra Nova's broker-dealer business was a corporate opportunity within the line of business of BlueWater for its

broker-dealer license and its ability to engage in soft-dollar trading. Although Defendants would like for this Court to find that BlueWater Partners simply promoted an "invention to display information," (Tr. of 11/22/04 p.m. at 128), we find that Terra Nova Trading as a broker-dealer is reasonably incident to the operations of BlueWater Partners pursuant to Kerrigan, 58 Ill. 2d 20 (1974). Comparing the two businesses structures, the only difference between Blue Water and Terra Nova is one of SEC licensing regulation over a non-broker-dealer and a standard broker-dealer. To have found such a slight difference in business structure between BlueWater and Terra Nova Trading, we would be amiss to decide otherwise.

Liability of GDP, Inc. and Unjust Enrichment

Plaintiffs wish for this Court to enter judgment against GDP because the usurped opportunities were transferred to GDP through Defendant Putnam, its sole shareholder and director. Therefore, Plaintiffs argue, Defendant Putnam's knowledge is imputed to the corporation. Plaintiffs further contend that liability does not depend on the duty owed to Plaintiffs. See People v. Warrant Motors, 114 Ill.2d 305, 320 (1986), In re De Mert & Dougherty, 271 B.R. 821 (Bankr. N.D.Ill. 2001). Despite the jury's finding that only Defendants Putnam and Terra Nova are liable for the usurpation count, under Warrant Motors and In re De Mert & Dougherty, Defendant Putnam's knowledge leading to a breach of fiduciary duty was imputed to both GDP and Terra Nova. Accordingly, we find that GDP shall be held liable for any liabilities by Defendants Putnam and Terra Nova.

Defendants concede that at most, GDP received one percent of the monetary distributions

generated from Defendants Putnam or Terra Nova. "To state a cause of action based on the theory of unjust enrichment, a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that the defendant's retention of that benefit violates fundamental principles of justice, equity, and good conscience." Firemen's Annuity & Ben. Fund v. Municipal Employees', Officers', and Officials' Annuity and Ben. Fund of Chicago, 219 Ill. App. 3d 707, 712, 579 N.E.2d 1003, 1007 (1st Dist. 1991). Here, because we have found GDP to be imputedly liable, it would be unjustly enriched should it be allowed to retain the benefit of monetary distribution.

SOES Rooms and ECNs

Despite our finding that Terra Nova, a broker-dealer, is reasonably incident to the BlueWater Partners business, Plaintiffs failed to prove that it is probably more true than not true that Defendants usurped either an ECN or a SOES room or that they are reasonably incident to BlueWater Partners. Plaintiffs argued that an ECN provides the same function as a traditional broker, serving as an agent between a buyer and a seller, but does this electronically. In addition, Plaintiffs brought forth testimony that a SOES room, a small order execution system, is a form of electronic trading. Defendant Putnam testified that Terra Nova's brokerage license and security capital was necessary to start Archipelago, an ECN, for its timely debut as allowed under the new SEC regulations. (Tr. of 11/22/04 a.m. at 57, 79-88, Pls.['] Ex. 117). After a period of time, Terra Nova ceased its sponsorship of Archipelago after it obtained its own broker-dealer license. (Tr. 12/9/04 a.m. at 37-38, Def. Ex. 467). Defendant Putnam testified that in October 1996, he attended a meeting with NASDAQ representatives, whereby he realized he could build

his own qualified ECN. (Tr. 12/7/04 at 107).

Plaintiff Lozman testified that in his discussion with Defendant Putnam, he identified business opportunities in electronic trading without need to be a shareholder (like Instinet) through a broker-dealer, electronic exchange, or a SOES trading room. Although Plaintiff Lozman testified that he spoke generally about electronic exchange rooms with Defendant Putnam, in other words, "do what Instinet did," Defendant Putnam denied that SOES room or electronic exchange conversations occurred before the release signing. (Tr. 12/1/04 p.m. at 126, Tr. 12/7/04 p.m. at 103). Louis Borsellino did not corroborate Plaintiff Lozman's testimony about his identifying a SOES room opportunity for BlueWater. Louis Borsellino testified that he did not recall talking about SOES rooms in early October of 1995. Despite disputed evidence that Joanie Weber overheard Defendant Putnam state that he was going to "get rid of Fane" and Paul Adcock's testimony that he believed Plaintiff Lozman to have been an owner of Terra Nova, we cannot agree that this evidence is sufficient to deem that a SOES room opportunity was usurped from Plaintiffs. Plaintiffs have not brought forth sufficient evidence to support their stance that it is probably more true than not true that an ECN or SOES room opportunities are reasonably incident to BlueWater. Archipelago, in its current form, is like a stock exchange rather than a broker-dealer. If we were to decide otherwise we would be expanding the scope excessively when ScanShift was but only one interface to RealTick, a Townsend Analytics trading software.

Opportunity to Decide with Full Disclosure

The plaintiff corporation must be given the opportunity to decide, upon full disclosure of the pertinent facts, whether it wishes to enter into a business that is reasonably incident to its present or prospective operations. Kerrigan v. Unity Savings Assoc., 58 Ill. 2d 20, 28 (1974), Pls. ['] Instruct. No. 20. Defendant Putnam failed to tender the broker-dealer opportunity to Plaintiffs. Plaintiff Lozman testified that he and Defendant Putnam had agreed to form a broker-dealer to soft dollar ScanShift so that the software could be furnished in exchange for brokerage commissions. (Tr. of 11/29/04 p.m. at 17-18, 12/08/04 p.m. at 34-35). Although MarrGwen Townsend gave contradictory testimony, Plaintiff Lozman explained that Terra Nova was created simply to allay the fear of the Townsends that partial ownership in BlueWater may have an adverse effect from on their relationships with existing broker-dealer customers and to avoid liability claims against BlueWater that might impact the Townsends. Plaintiff Lozman professed that he would not have consented to the formation of Terra Nova had he known that he would not be a fifty percent owner.

Conclusion on Usurpation Claim

We found that Plaintiffs to have satisfied their burden in proving four of the five elements of their usurpation claim, but we decline to analyze either the damages element or the constructive trust count because we have found the release to be valid. A valid defense of release prevents any finding of damages in a usurpation of corporate opportunity claim.

Release

This Court must now consider: (1) the sufficiency of consideration, (2) the existence of a condition precedent, (3) the validity of the release and (4) the scope of the release.

Legal Standard

A release is an abandonment of a claim in which one gives up any claims that he has against another. Pls. [‘] Instruc. No. 60, See Hurd v. Wildman, Harrold, Allen & Dixon, 303 Ill. App. 3d 84, 89, 707 N.E.2d 609, 613 (1st Dist. 1999). This Court may look to: (1) whether there was full and frank disclosure of all relevant information, (2) whether consideration was adequate, and (3) whether the other party had competent and independent advice. Pls. [‘] Instruc. No. 27A, Thornwood, Inc. v. Jenner & Block, 344 Ill. App. 3d 15 (1st Dist. 2003), Rizzo v. Rizzo, 3 Ill. 2d 291, 302, 305, 120 N.E. 2d 546, 553 (1954). The “defendant must show by competent proof that a full and frank disclosure of all relevant information was made to the other party.” Pls. [‘] Instruc. No. 27, Peskin v. Deutsch, 134 Ill. App. 3d 48 (1st Dist. 1985), Thornwood, Inc. v. Jenner & Block, 344 Ill. App. 3d 15 (1st Dist. 2003). “In appraising the validity of the release in the context of the fiduciary relationship, the defendant has the burden of showing by clear and convincing evidence that the transaction embodied in the release was just and equitable.” Id.

Releases are governed by contract law; accordingly, the intention of the parties to a release must be determined from the instrument itself, and construction of the instrument, where no ambiguity exists is a matter of law. (citation omitted). The construction of an ambiguous release is a question of fact and parol evidence is admissible to explain what the parties intended.

Gavery v. McMahon & Elliott, 283 Ill. App. 3d 484, 487 670 N.E.2d 822, 825 (1st Dist. 1996).

Under Gavery, Ill. App. 3d 484, 487 670 N.E.2d 822, 825 (1st Dist. 1996), we are bound by the jury's answers to Special Interrogatory Nos. 5 through 9. Specifically, the jury found that the release: (1) was not conditional to the return of ScanShift, (2) was just and equitable to Plaintiffs, (3) was signed with full disclosure, (4) was supported by consideration, and (5) was not limited to the April 17, 1995 agreement.

In addition, special interrogatories must be read in conjunction with the jury instructions to determine how the interrogatory was understood by the jury. Simmons v. Garces, 198 Ill. 2d 541, 555-56, 763 N.E.2d 720, 735 (2002). Plaintiffs' Instruction No. 60 states in part:

If you find that plaintiffs executed a valid and unconditional release of all claims against defendants, that the release is just and equitable and the product of a full disclosure of all material facts, and that the release covers all of the claims brought in this case, then you must answer the special interrogatories to this effect, special interrogatories 5-10.

The jury instruction shows that the jury answered special interrogatories Nos. 5 through 10 to reflect their understanding of their finding.

This Court rejects Plaintiffs' argument that Sangster v. Van Hooke, 67 Ill. 2d 96 (1973) bars our accepting the jury's answers to special interrogatories Nos. 5 through 10. It was clear to this Court that there was no reasonable doubt as to the jury's intent when they answered questions Nos. 5 through 10.

Notwithstanding the jury's answers, our analysis below concurs with the jury's findings.

Consideration Pertaining to Release

A "release must be based upon consideration which consists either of some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss of responsibility given, suffered or undertaken by another." Hurd v. Wildman, Harrold, Allen & Dixon, 303 Ill. App. 3d 84, 92, 707 N.E.2d 609 (1st Dist. 1999). "Any act or promise that is a benefit to one party or a detriment to the other is a sufficient consideration to support a contract." Hurd at 92.

We find that sufficient consideration exists for a valid release. In signing the release, Defendants waived all past personal and company unpaid expenses incurred by Plaintiffs, which included legal expenses, marketing expenses, convention fees, travel expenses, and the ScanShift demo fee. (Defs. ['] Ex. 63, 75, 189, 190, 191, 249). Defendant Putnam paged Plaintiff Lozman to meet at the Currency Exchange on October 9, 1995 and returned the stock certificates and gave his resignation from BlueWater. (11/30/04 a.m. Tr. at p. 53). Defendant Putnam testified he believed signing the October 9, 1995 release only obligated him to return the BlueWater stock certificates, though not physically returned, because they were being held at the law firm, Foley and Gardner. (11/22/04 a.m. Tr. at p. 13). Plaintiff Lozman accepted Defendant Putnam's resignation as president and director of BlueWater. Plaintiff Lozman then obtained complete control over the BlueWater business, and thereafter, over ScanShift.

Condition Precedent Pertaining to Release

A delivery of a release upon condition precedent means that it is not enforceable until the condition has been complied with. See Pls. [‘] Instruc. No. 29, Vauginaux v. Korte, 273 Ill. App. 3d 305, 309, 652 N.E.2d 840, 842 (5th Dist. 1995). If a written agreement does not contain any conditions precedent, then there is a presumption that there is no such condition. See Pls. [‘] Instruc. No. 56, Haas v. Cohen, 10 Ill. App. 3d 896, 899, 295 N.E. 2d 28, 30 (3d Dist. 1973).

We agree with the jury’s decision that no condition precedent existed concerning the ScanShift source code delivery. Plaintiff Lozman and Defendant Putnam provided contradictory testimony on whether returning ScanShift was a condition precedent to the validity of the release. The only evidence that Plaintiffs proffered to rebut the presumption that no conditions precedent existed was Plaintiff Lozman’s own testimony that the parties had agreed orally to return the ScanShift code back to BlueWater Partners. We do not find Plaintiff Lozman’s testimony was sufficient to rebut the presumption, especially given the circumstantial evidence provided by the parties.

Circumstantial evidence shows that Plaintiff Lozman was aware that Townsend Analytics controlled the ScanShift source code. Further, Plaintiff Lozman had clear knowledge that the Townsends were the party with control and ownership over the code. Also, Defendant Putnam and MarrGwen Townsend testified that the relationship between Plaintiff Lozman and Defendant Putnam and the Townsends deteriorated when Plaintiff Lozman repeatedly would arrive unannounced at Townsend Analytics to discuss technical bugs on the ScanShift software. The

testimony revealed and we believe that Plaintiff would demand that the Townsend Analytics engineers fix any technical bug immediately and would not leave the premises. Even after an altercation with Stuart Townsend, and after he and MarrGwen Townsend had asked Plaintiff Lozman to stop arriving unannounced, Plaintiff Lozman refused to follow their request. The testimony revealed that at one point, when the Townsends left for New York City for a trade show, Plaintiff Lozman still went to Townsend Analytics. After MarrGwen Townsend returned from New York City, her conversation with Plaintiff Lozman concerning future visits turned into one where he used excessive profanity. Therefore, this Court believes that no condition precedent existed over the release and no unfairness resulted although neither party had representation from counsel when signing the release. This evidence shows that there was a lack of a written condition precedent for the release and that no true meeting of the minds existed pertaining to the return of the ScanShift source code.

Unfairness Pertaining to Release

We agree with the jury's answer to Interrogatory No. 6 that the release is just and equitable to Plaintiffs. Both Plaintiff Lozman and Defendant Putnam are sophisticated business men in the trading industry. In particular, Plaintiff Lozman was shown to be an individual of intellect with a high IQ, having graduated college at an early age, then continued on to become an accomplished military pilot. He learned to trade as a teenager from his mother, who is also a sophisticated trader. His father and stepfather are professionals, a doctor and a lawyer respectively. In addition, Plaintiff Lozman's meticulous nature in preserving evidence, such as envelopes and other business documents, as well as his demeanor during cross examination, i.e.

he refused to answer questions out of context to their intended meaning. Due to the evidence that showed the sophistication of both Plaintiff Lozman and Defendant Putnam, despite the fact that neither party had a lawyer for the preparation or signing of the release, we do not find that unfairness resulted to Plaintiff Lozman.

Scope Pertaining to Release

We also agree with the jury's answer to Interrogatory No. 9 that the scope of the release was not limited to the April 17, 1995 agreement.

In November 1995, Plaintiff Lozman and Defendant Putnam signed a Termination Agreement, which Plaintiff Lozman believed preserved any claims concerning the source code, electronic trading, and electronic exchange. *Id.* He believed that the October 9, 1995 release only voided the April partnership agreement, which was attached to the release. (Tr. 12/1/04 p.m. at pp. 46-47). However, the release refers to both the April agreement and any obligations arising therefrom. Specifically, Plaintiff Lozman released Analytic Services, Terra Nova, Gerald Putnam, and Samuel Long from both (1) obligations past and present arising from past associations and (2) as a result of the April agreement. The face of the release, therefore, does not limit the scope to only the April agreement. To further supplement our reasoning, our analysis on the Cancellation count below clarifies in detail the scope of the release in conjunction with the Termination Agreement.

Presumption of Fraud on Release

This Court agrees with the jury's decision that the release is valid. Even if this Court were to agree with the jury that Plaintiffs entered into the release, Plaintiffs urge us to find constructive fraud due to the breach of fiduciary duty, as found by the jury, and thereby find the release to be voidable. See Obermaier v. Obermaier, 128 Ill. App. 3d 602, 607 (1st Dist. 1984). "In a fiduciary relationship, where there is a breach of a legal or equitable duty, a presumption of fraud arises." Id. Given that this Court agrees with the jury's finding that Defendants breached their fiduciary duty owed to Plaintiffs by usurping corporate opportunities, the burden falls upon Defendants to prove fairness of the transaction, i.e. the release, after a full and complete disclosure to dispel any presumption of fraud. Id. at 608.

Taking all of the evidence surrounding the release, this Court agrees with the jury's finding that Defendants proved fairness of the transaction by full and complete disclosure of all material facts surrounding their desire to be released from all obligations to the other party. "A fact is material if the plaintiff would have acted differently had he been aware of it," thus making the release voidable if Defendant Putnam had withheld material facts before the release. See Golden v. McDermott, Will & Emery, 299 Ill. App. 3d 982, 990-91, 702 N.E.2d 581, 587 (1st Dist. 1998).

Terra Nova Trading, as a broker-dealer was established on November 14, 1994. Terra Nova Trading had already been established and operational for approximately one year when both parties signed the release and Termination Agreement. Defendant Putnam had the release

drafted so that it specifically releases Terra Nova Trading, the usurped broker-dealer business, from "any obligations past and present" arising from Plaintiff Lozman's past associations.

Despite representation by Craig Fowler of BlueWater Partners after the release was signed, no evidence exists in the Termination Agreement that Plaintiff Lozman wished to preserve any cause of action specifically regarding Terra Nova Trading for a usurpation of a broker-dealer claim or incredibly that the release was signed on condition that the ScanShift source code be returned. The jury also must have found incredible that no reference to a return of ScanShift was memorialized in the Termination Agreement. (See Answ. to Interrogatory No. 1). Sam Long also asked for a separate release for Analytic Services, which handled the marketing and sales of ScanShift and RealTick. After taking into consideration all the evidence and testimony, this Court finds that Defendants dispelled any presumption of fraud by proving that the signing of the release was fair and that both parties executed a valid and unconditional release.

Accordingly, we find the release to be a valid.

Ratification

Legal Standard

If a person signs a release, determines that there might be a problem with the release, and then retains the consideration they received for that release for an unreasonable amount of time after learning there might be a problem, then that person's conduct in holding onto the consideration ratifies the release, and he may not claim the release is unenforceable. Pls. [']

Instruc. No. 69, See Hofferkamp v. Brehm, 273 Ill. App. 3d 263 (4th Dist. 1995), See Peskin v. Deutsch, 134 Ill. App. 3d 48 (1st Dist. 1985), See Kane v. American Nat'l Bank and Trust, 21 Ill. App. 3d 1046 (2d Dist. 1974).

To establish ratification, Defendants must prove the following elements: (1) that Plaintiffs received consideration or benefits in exchange for signing the release, (2) that Plaintiffs knew, or through reasonable inquiry should have known, there might be a problem with the release, (3) that Plaintiffs retained the consideration or benefits they received in exchange for signing the release, and (4) that Plaintiffs waited an unreasonable amount of time after they learned there might be a problem with the release to make a claim that there was a problem with the release.

Id.

Ratification is governed by contract law. As a legal claim, we are bound by the jury's answers to Special Interrogatory No. 10. Specifically, the jury found that Plaintiffs ratified the release. Notwithstanding the jury's answers, our analysis below concurs with the jury's findings.

Analysis of Ratification

Thus far, evidence has been provided to support that Plaintiffs received and retained ownership and control over BlueWater. Plaintiff Lozman recruited John Najarian to become a shareholder then later a board member for BlueWater. Plaintiff Lozman opened an office for BlueWater at Mercury Trading offices to continue marketing and licensing ScanShift. He also involved John Bollinger to network the software and Don Wilson to endorse the software with his fame. Plaintiff Lozman hired another software company to program a platform to suit ScanShift. With plans to develop a business relationship between Tudor Investment and BlueWater, Plaintiff Lozman wrote a letter reflecting Plaintiffs also retained Craig Fowler to

draft a Termination Agreement to verify that Defendant Putnam had resigned his ownership in BlueWater.

In addition, circumstantial evidence shows both parties wished to sever the soured relationship. Plaintiff Lozman terminated all relationships with ScanShift customers by canceling the licenses after the release was signed. Plaintiff Lozman sent a letter to Defendant Putnam, TAL, and Samuel Long to inform them that ScanShift could no longer be sold as an option to RealTick. (Tr. 12/1/04 p.m. at 93). At the release signing, testimony was given that Plaintiff Lozman stated, "Whatever has happened you know how important the Marine Corps was to me. They taught me to be a man of honor, and I'm a man of my word. I promise you that you will never see or hear from me again." He contacted Defendant Putnam in 1998.

Defendants argued that after such a tumultuous year spent in their business relationship, it is inconceivable that Defendant Putnam would have continued to include Plaintiffs in any future business plans. Defendant Putnam testified that in June 1995, he decided to end his relationship with Plaintiff Lozman due to his disruptive behavior in the office and complaints received about Plaintiff Lozman from other colleagues, vendors, and customers. (Tr. 12/7/04 p.m. at 47-48; Tr.12/8/04 p.m. at 57). On January 20, 1995, Plaintiff Lozman was involved in months of painful physical therapy because of a bicycle accident. At the time, he was unsure whether he could return to work. In March of 1995, he returned to the office and practiced his numchucks there to continue his physical therapy. Defendant Putnam testified that Plaintiff Lozman swung the numchucks at others in the office, in one instance into Colleen Mitchell's ponytail. Defendant Putnam heard Plaintiff Lozman harass and intimidate Paul Adcock and Evan Jones

and would refuse to get out of their chairs without confrontation. Defendant Putnam also testified that Plaintiff Putnam would swing Sam Long's golf putter in the office towards others. In addition, Defendant Putnam testified that he received a call from Paul Tudor Jones informing Defendant Putnam that Plaintiff Putnam was repeatedly calling traders at Paul Tudor Jones' office and that his behavior had to stop. Defendant Putnam further testified that despite asking Plaintiff Lozman to stop all of the previously mentioned behavior, he refused to do so. At the October 9, 1995 signing, Defendant brought a list of demands to effectuate ending the partnership to further demonstrate his intent to completely sever his relationship with Plaintiff Lozman. (Tr. 12/7/04 p.m. at p. 84).

This Court agrees with Defendants that the release was a valid agreement. The release was supported by consideration, namely 100% ownership of BlueWater Partners by Plaintiff Lozman, in exchange for the complete severance of the relationship between the parties. By the language of the release, Plaintiffs were put on notice that Defendants planned to continue on with Terra Nova completely without Plaintiffs. Although Plaintiffs argue that under Illinois law, no time limit governs when Plaintiff Lozman should have returned any benefit to the release, we believe that it would be inequitable to allow Plaintiffs to claim such a defense to ratification even after the conclusion of the jury trial, while having enjoyed the benefits of the release. Therefore, this Court deems that Plaintiffs' actions have ratified the release.

Cancellation

In addition, we cannot agree with Plaintiffs' argument that the Termination Agreement,

signed in November 1995, by both Plaintiff Lozman and Defendant Putnam, is the final binding written agreement that controlled Plaintiffs' ability to bring a usurpation of corporate opportunity claim. Plaintiffs argue that the Termination Agreement cancels the release.

The Termination Agreement states in part:

1. **Termination.** Effective immediately, the Shareholders' Agreement is hereby terminated and of no further force or effect; provided, however, that any causes of action which may have arisen thereunder prior to the date of this Termination Agreement, whether for or with respect to actions, inactions, breaches thereof or other matters, shall survive this termination.
2. **Entire Agreement.** This Agreement constitutes the entire agreement of the parties hereto with respect to the subject matter hereof and supersedes any and all prior memoranda, correspondence, conversations and negotiations in such regard.

Although both parties agree that the Termination Agreement was signed in November 1995, we must first look within the four corners of the document for interpretation. See Doyle v. Holy Cross Hosp., 186 Ill. 2d 104, 126, 708 N.E.2d 1140, 1151 (1999). Comparing the Termination Agreement to the release, because they are both dated October 9, 1995, they are contemporaneous written agreements that must be concurrently construed. Agreements that are contemporaneously entered into, "...are considered one contract and the information needed to determine what claims, demands, and causes of action were intended can be derived from the face of the contemporaneously executed documents." Thornwood, Inc. v. Jenner & Block, 344 Ill. App. 3d 15, 22, 799 N.E.2d 756, 763 (1st Dist. 2003).

First, since we find the agreements were entered into contemporaneously, the integration clause is inapplicable since the release is not prior memoranda, correspondence, conversations or negotiations. See id.

Second, the Termination Agreement contains a termination clause, which is drafted in a general fashion. In contrast, the release is less general. In particular, Plaintiff Lozman released Analytic Services, Terra Nova, Gerald Putnam, and Samuel Long from (1) obligations past and present arising from past associations and (2) as a result of the April agreement. The release specifically releases Terra Nova, which is the usurped business opportunity. Construing both the release and the Termination Agreement as a whole, an ambiguity exists over future obligations and causes of actions. Parol evidence clarifies the ambiguity of whether a usurpation claim was preserved.

In the construction of an ambiguous or uncertain writing which is intended to state the entire agreement, preliminary negotiations between the parties may be considered in order to determine their meaning and intention and to ascertain in what sense the parties themselves used the ambiguous terms in the writing which sets forth their contract.

Rybicki v. Anesthesia Analgesia Assoc., Ltd., 246 Ill. App. 3d 290, 299, 615 N.E.2d 1236, 1243 (1993).

In light of the evidence, we interpret the term "obligations" in the release to include Plaintiffs' usurpation claim. We looked to the preliminary negotiations to solely interpret the ambiguous terms of the contracts and as an aid to its construction. See id. Plaintiff Lozman had an attorney, Craig Fowler, draft the Termination Agreement, which was purposefully backdated to October 8, 1995, instead of November, the month when it was indisputably signed. We also relied on our release analysis to look to the preliminary negotiations. To reiterate, Defendant Putnam testified that in June 1995, he decided to end his relationship with Plaintiff Lozman due to his disruptive behavior in the office and complaints received about Plaintiff Lozman from other colleagues, vendors, and customers. (Tr. 12/7/04 p.m. at 47-48; Tr. 12/8/04 p.m. at 57). On

July 11, 1995, Plaintiff Lozman sent a letter to Defendant Putnam, TAL, and Samuel Long to inform them that ScanShift could no longer be sold as an option to RealTick. (Tr. 12/1/04 p.m. at 93). During the same time period, Plaintiff Lozman also terminated all relationships with ScanShift customers by canceling the licenses. Defendants argued, and we agree, that after such a tumultuous year spent in their business relationship, it is inconceivable that Defendant Putnam would have continued to include Plaintiffs in any future business plans. Defendant Putnam testified, and we agree, that Plaintiff Lozman presented the Termination Agreement as a clean-up document that better reflected their previous agreement under the release and resolved the problems with the transfer of shares. This creates a contradiction between the waiver of causes of action in the release and the preservation of causes of action in the Termination Agreement.

The contradiction found between the Termination Agreement and the release creates a disputed question of fact for this Court to determine which agreement governs Plaintiffs' ability to file a usurpation claim. Taking into account the preliminary negotiations surrounding the signing of the agreements and the specific construction of the release of Terra Nova, this Court concludes that the release and the waiver of causes of action arising from the relationship with Terra Nova governs Plaintiffs actions. Further, the Termination Agreement specifically refers to the termination of the Shareholders' Agreement. Had the parties intended for the Termination Agreement to prevail over the release, we believe that Plaintiffs would have had their legal counsel include the term "release" within the termination clause. Therefore, the release was neither cancelled nor rescinded by the Termination Agreement.

Rescission and Reformation

To prove rescission, Plaintiffs must prove: (1) there are grounds to set aside the release, (2) upon learning of these grounds, they acted with reasonable diligence and promptly attempted to rescind the release Eisenberg v. Goldstein, 29 Ill. 2d at 622, 195 N.E.2d at 186-67 (1963), Illinois State Bar Ass'n Mut. Ins. Co. v. Coregis Ins. Co., 355 Ill. App. 3d 156, 165-66, 821 N.E.2d 706, 713 (1st Dist. 2004), (3) they returned the consideration or at least offered to return the consideration Jackson v. Anderson, 355 Ill. 550, 555, 189 N.E. 924, 926 (1934), Corbett v. Devon Bank, 12 Ill. App. 3d 559, 573-74, 299 N.E.2d 521, 530 (1st Dist. 1973), and (4) the return of consideration allows the parties to be placed in *status quo ante* Wilkinson v. Yovetich, 249 Ill. App. 3d 439, 446, 618 N.E.2d 1120, 1125 (1st Dist. 1993).

Similar to our analysis under the Cancellation count, this Court finds that Plaintiffs failed to prove that they are entitled to rescission of the release. Plaintiffs failed to act with reasonable diligence in rescinding the release when they hired Craig Fowler to represent BlueWater. They did not return nor attempt to return the consideration received from Defendants, namely the ownership of BlueWater. Even if the consideration were returned, Defendants would not be placed in *status quo ante* because he developed and changed Terra Nova Trading with the understanding that he was completely released from any obligations. Any attempt to return Defendants to *status quo ante* would be prejudicial. Therefore, Plaintiffs' request for this Court to rescind the release is denied. In addition, due to our analysis of the Cancellation and Rescission counts, we also decline to reform the Shareholders' Agreement.

Laches

A usurpation of a corporate opportunity claim is based in equity and subject to the equitable defense of laches. In order for laches to prevail as an affirmative defense, Defendants must have proven: (1) that there was an unreasonable delay by Plaintiffs in asserting their claim and (2) that the delay prejudiced Defendants. See Jameson Realty Group v. Kostiner, 351 Ill. App. 3d 416, 432, 813 N.E.2d 1124, 1137 (1st Dist. 2004). For the first prong, Plaintiffs “must have failed to seek prompt redress after having knowledge of the facts upon which his claim is based.” Eckberg v. Benso, 182 Ill. App. 3d 126, 132, 537 N.E.2d 967, 972 (1st Dist. 1989). “Plaintiffs need not have actual knowledge of the specific facts upon which his claim is based if he fails to ascertain the truth through readily available channels and the circumstances are such that a reasonable person would make inquiry concerning these facts.” Id.

Plaintiff Lozman testified that he attempted to find counsel in September 1995 but lacked the financial resources to pay the necessary retainer. He also notified Defendant Putnam, the Townsends, congressional committees, and government agencies of his impending suit. However, as we previously analyzed, at the time of the release signing, Plaintiff Lozman knew that Defendant Putnam intended to continue operating Terra Nova trading, a broker-dealer reasonably incident to BlueWater. Further, in November 1995, Plaintiffs hired Craig Fowler to represent BlueWater, for which he drafted a Termination Agreement. Here, we see that Plaintiffs had two opportunities when they could have filed a usurpation claim but failed to seek prompt redress. Even if Plaintiffs had no actual knowledge of the specific facts, we believe that under the Eckberg court’s reasonable person standard, Plaintiffs had enough facts from the

circumstances surrounding the release and legal representation to realize that Defendant Putnam was going to continue with Terra Nova solely as his broker-dealer business. 182 Ill. App. 3d 126, 132, 537 N.E.2d 967, 972 (1st Dist. 1989). Defendants also developed and substantially changed the business structure of Terra Nova Trading with the understanding that he was completely released from any obligations. Defendants would be prejudiced should we allow Plaintiffs to file a claim so many years after their claim was ripe for suit but they had failed to diligently file suit. Accordingly, Plaintiffs' usurpation claim is barred by Defendants' laches affirmative defense.

Preemption

Pursuant to Section 15(a)(1) of the 1934 Act, an individual must be registered with the Securities Exchange Commission to receive brokerage commissions. In relevant part Section 15(a)(1) states:

It shall be unlawful for any broker or dealer which is either a person other than a natural person or a natural person not associated with a broker or dealer which is a person other than a natural person... to make use of the mails or any means or instrumentality of interstate commerce to effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security... unless such broker or dealer is registered in accordance with subsection (5) of this section.

Where conflict preemption occurs, the conflicting State law must yield to federal law. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 108 (1992). Defendants have the burden of proving preemption by a preponderance of the evidence. See LaSalle Nat'l Bank, 337 Ill. App. 3d at 351, 785 N.E.2d at 1002.

We find that Defendants failed to prove by a preponderance of the evidence that the soft-dollar licensing agreement under BlueWater Partners was to be governed under the Securities Exchange Commission. Ed Mason advised BlueWater not to request a No Action Letter from the SEC to determine whether their business plan would require a broker-dealer license. Frank McAuliffe testified that actively involved broker-dealer owners must be identified on the broker-dealer application form and the Uniform Registration application. Passive investors in a broker-dealer business need not be licensed by the NASD or SEC to share in the net revenue. (Tr. 11/23/04 p.m. at 109). No broker-dealer application was filed that reflected the active registration of Plaintiffs and neither party took action to do so. Similar to our reasoning under the corporate usurpation analysis, we believe that the parties' inaction reflects the ambiguity of whether BlueWater was required to register as a broker-dealer under the SEC regulations. Because Defendants failed to prove by a preponderance of the evidence that Plaintiffs were active investors, partners, or officers who required a broker-dealer license, Plaintiffs' claims are not preempted by federal law.

ORDER

Wherefore, for the reasons set forth above,

Judgment is entered for Defendants D. Putnam, Terra Nova Trading, L.L.C. and GDP, Inc. against Plaintiffs Fane Lozman and BlueWater Partners, Inc. on all counts (2, 4, 18, 19, 20, all claims against GDP, Inc., and the counterclaim for declaratory judgment).

Hon. Allen S. Goldberg