

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LEWIS BORSELLINO, and)
I.M. ACQUISITIONS, LLC)
)
Plaintiffs,)
)
v.)
)
GOLDMAN SACHS GROUP, INC.,)
)
Defendant.)

COMPLAINT

Now come Plaintiffs, Lewis Borsellino and I.M. Acquisitions, LLC, by their counsel, Loevy & Loevy, and for their complaint against Defendant, Goldman Sachs Group, Inc. (“Goldman Sachs”), state as follows:

A. Overview

1. This action arises out of a pattern of fraud and racketeering activity committed by Gerald Putnam and others in the formation of an electronic stock trading network known as Archipelago, LLC (“Archipelago”).

2. Archipelago was one of the original four companies authorized by the Securities and Exchange Commission (“SEC”) to handle NASDAQ stock trades by pairing buyers and sellers through an electronic network.

3. Archipelago began operating in January of 1997 and it grew fantastically. Today it is a massive electronic stock exchange, so dominant in the industry that it has agreed to merge with the New York Stock Exchange (“NYSE”).

4. Plaintiff, Lewis Borsellino, is Putnam’s former partner in a company known as Chicago Trading and Arbitrage (“CTA”). They formed CTA in 1996 to provide high-tech electronic

order execution for retail NASDAQ traders. To that end, CTA purchased state of the art equipment and network lines for access to the NASDAQ, paid connectivity fees to the NASDAQ, and developed proprietary software useful for electronic stock trading, among other steps.

5. Archipelago was a business opportunity of CTA. Moreover, as is explained in greater detail below, Archipelago was created and operated using CTA's assets including its NASDAQ network infrastructure, its revenues, its customers, and its computers. Putnam diverted these assets to Archipelago through a pattern of racketeering activity in the conduct of both Archipelago's and CTA's businesses. For example, for the first year of its existence, the Archipelago network functioned by illegally piggy-backing its customers' trades through CTA's NASDAQ platform and across its communications network to the NASDAQ exchange. In so doing, Putnam and his co-conspirators committed wire fraud (and also violated other federal criminal statutes) with every Archipelago trade.

6. The stolen business opportunity proved to be extraordinarily valuable. In the approximately one-year period while Putnam was diverting CTA's assets to create this business, Archipelago went from a start-up concept to a company worth tens of millions of dollars with big brokerage houses courting it. Today, Archipelago has a market capitalization of over \$2 billion, and its investors include large financial institutions like Defendant Goldman Sachs, E-Trade, Credit Suisse First Boston, and JP Morgan Chase, among others.

7. Plaintiff currently is suing Putnam in separate state court proceedings where he claims that Putnam breached fiduciary duties by diverting assets and business opportunities to build Archipelago. Plaintiff also claims that Putnam defrauded him into selling his interest in CTA by concealing the fact that Archipelago was built with CTA assets and that Plaintiff therefore was relinquishing a legal claim to one-third of Archipelago.

8. Plaintiff brings this lawsuit because he has discovered through the course of the state court litigation that Defendant Goldman Sachs conspired with Putnam in the diversion of CTA assets and in the concealment of Plaintiff's claim to one-third of Archipelago.

9. Putnam recently admitted under oath in the state case that Goldman Sachs market makers were involved in the early stages of Archipelago and participated in the very testing needed to obtain SEC and NASDAQ approval, testing which was conducted using CTA's NASDAQ platform and CTA's traders. Moreover, in light of the evidence uncovered, it is now clear that Goldman Sachs was a conspirator with Putnam in defrauding Plaintiff into abandoning his interest in CTA, and thus his rights to one-third of Archipelago. Although Goldman Sachs was in talks with Putnam to invest in Archipelago for a year or more, it waited to ink a formal deal until after Putnam defrauded Plaintiff into relinquishing his interest in CTA, signing a letter of intent on a \$25 million deal a mere two months after the fraudulently-induced settlement became final.

10. Most significantly, as is explained in greater detail below, there is now substantial evidence indicating that Goldman Sachs and Putnam engaged in a cover-up by destroying the documentation of Goldman Sachs's involvement in order to protect Goldman Sachs. Although it is now known and can be proved that Goldman Sachs participated in the start up of Archipelago and that it began active negotiations to purchase a \$25 million stake in Archipelago no more than six months later, Putnam and Goldman Sachs have all claimed that they have no documents concerning any relationship or discussions between Archipelago and Goldman Sachs from that time frame, *i.e.*, the time when Putnam was diverting CTA's assets to form and run Archipelago and while Plaintiff was still an owner of CTA.

11. Given the facts showing that Goldman Sachs indeed was involved with Archipelago during this time frame and made a very large investment shortly thereafter, it is simply not credible

that Goldman Sachs has no contemporaneous documents, not even a single email.

12. Plaintiff diligently pursued uncovering the information demonstrating the claims asserted herein, but the cover-up and conspiratorial document destruction prevented him from sooner discovering these claims.

13. Moreover, the relationship between Goldman Sachs (and its principals) and Archipelago (and its principals) is extraordinarily tight and has been so at all times relevant, preventing the flow of information to Plaintiff about their conspiracy. Goldman Sachs is a major shareholder of Archipelago as well as the largest seatholder on the NYSE, Archipelago's merger partner. Moreover, the lead deal maker for Goldman Sachs on the Archipelago purchase was its then technology chief (and later CEO) John Thain. Mr Thain is now CEO of the NYSE and is slated to be CEO of the post-merger NYSE with Putnam serving as President and Chief Operating Officer.

14. Plaintiff brings claims for damages due to Goldman Sachs's misconduct under state and federal law, including: a claim for racketeering conspiracy under the federal Racketeering Influenced and Corrupt Organizations Act ("RICO") 18 U.S.C. § 1962(d); a state law claim for Tortious Interference with Economic Advantage; a state law claim for Tortious Inducement of Breach of Fiduciary Duties; a state law claim for Civil Conspiracy; and, state law claims for both Intentional and Negligent Spoliation of Evidence by Document Destruction. Plaintiff seeks actual, treble, and punitive damages in connection with these claims.

B. Jurisdiction and Venue

15. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1332 and 1367. Plaintiff's RICO claim arises under the laws of the United States and his state law claims arise out of the same subject matter. Moreover the parties are citizens of different states and the amount in controversy exceeds this Court's jurisdictional minimum. Venue is proper as Plaintiff is a resident of this district

and a large portion of the events that give rise to the case occurred here.

C. The Parties and Other Relevant Persons and Entities

16. Plaintiff Lewis J. Borsellino (“Borsellino”) is a citizen of the State of Illinois, residing in Oak Brook, Illinois. At all times relevant hereto, Plaintiff was a member of the Chicago Mercantile Exchange where he was a well-known and highly successful commodities trader. He also was a one-third owner of Chicago Trading & Arbitrage together with Gerald Putnam, also a one-third owner, and Marrgwen Townsend and Stuart Townsend (the “Townsend”), who together owned a third of the company.

17. Plaintiff I.M. Acquisitions, LLC (“I.M. Acquisitions”) is an Illinois limited liability company owned and operated by Borsellino. When CTA became an LLC, Borsellino created I.M. Acquisitions to hold his one-third interest.

18. Defendant Goldman Sachs Group, Inc. is a corporation organized under the laws of the State of Delaware, with its principal place of business in New York, New York.

19. Gerald D. Putnam (“Putnam”) is the chairman and chief executive officer of Archipelago Holdings, LLC, the parent company of the Archipelago network and ArcaEx (the Archipelago stock exchange). At all times relevant Putnam was also the owner of a broker dealer known as Terra Nova Trading.

20. The Townsends were co-founders of the Archipelago trading network, together with Putnam, and of Chicago Trading & Arbitrage, together with Putnam and Borsellino. They are also the owners of Townsend Analytics, Ltd. (“Townsend Analytics”).

21. Chicago Trading & Arbitrage, LLC was, from its inception in January 1996 until December 31, 1996, a general partnership whose partners were Borsellino, Putnam, and the Townsends. On December 31, 1996, Chicago Trading filed articles with the Illinois Secretary of

State to become a limited liability company, whose members became: I.M. Acquisitions, for Borsellino, GDP, Inc., for Putnam, and Virago Enterprises, for the Townsends.

D. The Formation and Operations of Chicago Trading & Arbitrage

22. In or about 1994, Putnam was fired from Prudential Securities where he was a stock broker, and, thereafter, he began trying to make a living as an independent broker/dealer.

23. At the time the “day-trading” phenomenon was beginning to become popular. Although day-trading later came to be associated with transactions executed over the internet, at that time it took place mainly in “day-trading rooms” run by companies with the technology needed to access the NASDAQ. The systems used by these rooms to access the NASDAQ were called Small Order Execution Systems (or “SOES”).

24. Putnam had no experience in the day-trading business and was unable to fund a room on his own. Moreover, unlike Borsellino, Putnam was an unknown in the business, lacking the notoriety needed to generate customers to make the company a success. Accordingly, Putnam approached Borsellino about partnering with him and the Townsends in creating a day-trading room.

25. Borsellino, at the time, was a highly successful commodities trader at the Chicago Mercantile Exchange. Borsellino was not only well-known in the Chicago trading community, but also around the country due to his frequent appearances on financial news shows and at trading seminars. Borsellino was therefore perfectly situated to provide the vital service of recruiting individual traders to become customers of the day-trading business.

26. Putnam, Borsellino and the Townsends agreed that they would each be one-third owners in the business, that they would each contribute funds equally to the business, and that they would share all profits and losses equally. They further specifically agreed that Borsellino's primary role would be the recruitment of traders, Putnam's primary role would be providing broker dealer

services and running the day-to-day operations of the business, and the Townsend's primary role would be contributing software and general technology expertise needed for the venture. At Borsellino's suggestion they called the business Chicago Trading & Arbitrage.

27. Over the course of CTA's existence, Borsellino invested substantial funds and hundreds of hours in developing the business by recruiting traders to be its customers.

28. CTA commenced SOES trading operations in May of 1996.

29. Putnam ran the day-to-day operations of CTA, while Borsellino continued actively trading commodities at the Chicago Mercantile Exchange and recruiting traders for CTA.

The Technological Assets of CTA

30. In order to provide traders with electronic access to the NASDAQ, CTA needed to purchase three key components: (1) a NASDAQ Level II Workstation; (2) a dedicated digital telephone connection to the NASDAQ; and (3) a NASDAQ Service Delivery Platform ("NASDAQ Server") (collectively a "NASDAQ platform"). CTA also needed software, described further below.

31. Borsellino contributed substantial sums of money to CTA so that it could purchase these assets and develop the necessary software.

32. In addition to the investment in equipment, there were also monthly charges by MCI for the digital telephone line and by the NASDAQ for access to its electronic ordering system. Because CTA paid for all the equipment and charges, these were all assets of CTA.

33. At the outset, the Townsends supplied CTA with a stock quote display program they called "Real Tick." Real Tick took raw market data from data vendors and translated it into buy and sell prices for the traders. However, the software lacked the key ability to allow traders to execute trades themselves. Rather, the traders had to yell out their orders verbally, and Putnam or others would enter the orders into the NASDAQ Level II workstation to be executed.

34. To automate that process, the Townsends developed a “point & click” software package which allowed the CTA traders direct access to the NASDAQ Level II workstation to enter their own trades. Development of the software required the payment of NASDAQ computer-to-computer and digital interface service access fees.

35. Development of the software also required testing using CTA’s technological assets and its traders. CTA also absorbed other costs associated with the development of the software. During the testing phase, numerous trading errors occurred. For example, sometimes a trader would hit the “buy” window more than once and inadvertently purchase more shares of stock than intended. CTA paid the costs associated with any such errors.

36. Similarly, the Townsends had undertaken to provide the technological expertise needed by CTA as part of their obligations to the partnership just as Borsellino had undertaken to recruit the customers for the room. Therefore, given all of the above, the point and click software was part of the technological assets belonging to CTA.

37. Every trade executed through CTA’s NASDAQ platform effected interstate commerce. Each trade traveled as an electronic signal from CTA’s trading room in Chicago, Illinois to the NASDAQ exchange in New York, New York.

E. Putnam Begins Exploiting CTA Through a Pattern of Racketeering Activity

38. As explained above, the “point & click” trading software provided traders the ability to submit their orders directly to the NASDAQ through CTA’s NASDAQ platform.

39. Beginning in mid-1996 and continuing until late in 1997 or early in 1998 (when Archipelago moved from CTA’s offices to a new location), Putnam began using his control over the day-to-day operations of CTA to offer services to day-traders separately from CTA, but using CTA’s technological assets to do so. Specifically he began networking remote day-trading rooms around

the country into CTA's NASDAQ platform and providing them the "point and click" software to execute trades through the platform. This was essentially a "turn key" service for setting up day-trading rooms just like CTA but without the need to invest in the infrastructure and proprietary software that CTA had purchased. The only reason these rooms did not have to invest in the same technological assets that CTA purchased and developed was because Putnam was selling the use of CTA's assets to them.

40. Putnam and the Townsends received a portion of the commissions that each day-trading room earned on these trades, as well as licensing fees for the "point & click" software and routing fees for the trades. The profits in these two years alone amounted to millions of dollars. Although these profits belonged to the CTA partners, they were improperly withheld from CTA and Borsellino.

41. Putnam kept these transaction concealed from Borsellino, never disclosing that he was entering into these relationships with the remote day-trading rooms, providing trading services separately from CTA, and/or using CTA's technological assets to do it.

42. This side operation was highly successful. Dozens of day-trading rooms used the service, sending, at a minimum, thousands of transactions each month from the remote trading rooms, through CTA's NASDAQ platform in Chicago to the NASDAQ in New York.

43. Each of these transactions were fraudulent and illegal, involving a theft from CTA.

44. Each of these transactions violated the federal wire fraud statute, 18 USC § 1343. Each transaction involved the sending of a signal through interstate commerce from CTA's offices in Chicago, Illinois to the NASDAQ in New York, New York. Each transaction was sent as part of Putnam's "scheme or artifice to defraud" Borsellino and CTA by diverting the use of CTA's assets and corporate opportunities of CTA.

45. Each of these transactions also violated federal prohibitions on the misuse of telecommunications access devices in 18 USC § 1029(a)(2,5,7 and 9). These transactions were unauthorized, were conducted using CTA's technological assets (as modified by the addition of lines into the system), and the scheme earned vastly more than \$1,000 in each year of its operations.

F. Putnam, with the Assistance of Goldman Sachs, Diverts Cta Resources to Develop the Archipelago Trading Network Through a Pattern of Racketeering Activity

46. In 1996, early in CTA's operations, the SEC adopted new rules allowing for the creation of electronic trading environments called Electronic Communications Networks (or "ECNs") which would bring together buyers and sellers of a particular NASDAQ stock directly. Under the rules, ECNs could begin operating in January of 1997. ECNs were similar to SOES operations, providing order execution for the same stocks using essentially the same technologies.

47. Indeed, participation as an ECN required the same NASDAQ connectivity as CTA was already providing through its NASDAQ service delivery platform and digital telephonic connection, and which Putnam was already diverting for use by the remote day-trading rooms.

48. Due to their access to CTA's technological assets and the substantial order flow being generated by the illicit remote day-trading room operations, Putnam and the Townsends had a sufficient customer base to support an ECN trading environment and the technology needed to run one. Accordingly, they decided to organize an ECN as 50/50 partners.

49. On December 27, 1996, they filed articles with the Illinois Secretary of State creating the Archipelago ECN as an Illinois limited liability company. Archipelago's address was listed as 318 West Adams, Suite 1600, Chicago, Illinois, which was also CTA's address. The managers were listed as Putnam and Marrgwen Townsend, and their addresses were listed as 318 W. Adams, Suite 1600, Chicago, Illinois, as well.

50. In order for Archipelago to function, Townsend Analytics wrote computer software for the Archipelago ECN whereby if a trader placed a trade with the Archipelago ECN and that trade was not matched internally on Archipelago's electronic order book, the trade would be routed to other market makers at the NASDAQ in search of a match. Such trades were routed using CTA's NASDAQ platform including its NASDAQ Level II Workstation, digital NASDAQ telephone line, and NASDAQ Server. Similarly, all Archipelago trades and open orders were reported to NASDAQ through this same system. Such reporting was required for the operation of an ECN.

51. As with the "point and click" software, development of the Archipelago software required use of CTA's technological assets, access to its traders, and the use of its trading room.

52. In order to be approved as a qualified ECN, Archipelago had to demonstrate to the SEC and NASDAQ that the ECN was operating properly. To this end, Archipelago conducted weekend testing during the first two weekends in January 1997 (when Borsellino was not likely to be present) using CTA's trading room at 318 W. Adams, as well as its NASDAQ platform and traders. The testing involved executing mock trades with the NASDAQ. Putnam and both of the Townsends participated in this testing.

53. It is now known, due to Putnam's testimony at his deposition on January 9, 2004, in the state court litigation, that mGoldman Sachs market makers, including Joe De La Rosa and others, were also aware of, and participated in, this testing, making multiple trades across CTA's platform on the weekend testing days.

54. The test was a success and thus cleared the way for Archipelago to operate as one of only four approved ECNs. Archipelago began providing ECN services on January 20, 1997.

55. Putnam and the Townsends furnished the Archipelago software to the remote day-trading rooms which they were then providing with the point and click software and access to CTA's NASDAQ platform. They began encouraging these remote day-trading rooms to make stock trades using the Archipelago ECN.

56. The testing, as well as each actual order placed through Archipelago, violated the federal wire fraud statute, 18 USC § 1343. Each transaction involved the illicit use of CTA's NASDAQ platform to send a signal through interstate commerce from CTA's offices in Chicago, Illinois to the NASDAQ in New York, New York. Each transaction was sent as part of Putnam's scheme or artifice to defraud Borsellino and CTA by diverting the use of CTA's assets and corporate opportunities of CTA.

57. The testing and each of the above transactions also violated federal prohibitions on the misuse of telecommunications access devices in 18 USC § 1029(a)(2,5,7 and 9). These transactions were unauthorized, were conducted using CTA's technological assets (as modified by the addition of hardware and lines allowing Archipelago greater access into the platform), and the scheme earned vastly more than \$1,000 in each year of its operations.

58. The pattern of the above violations continued until Putnam and the Townsends relocated Archipelago to new offices in late 1997 or early 1998.

G. Goldman Sachs Conspires in the Archipelago RICO Violations and the Breach of Fiduciary Duties Owed to Plaintiff

59. As explained above, it is now known that Goldman Sachs actually participated in the testing phase of the Archipelago ECN and the violation of federal prohibitions on wire fraud and the misuse of access devices. It is now also clear that Goldman Sachs's role in the RICO violations extended far beyond even that level of participation.

60. Based on Goldman Sachs's early involvement in the Archipelago ECN, as well as Goldman Sachs's spoliation of documents and other additional facts set out below, Plaintiffs are informed and believe that Goldman Sachs entered into a conspiracy with Putnam during the 1997 time frame which included the following aspects.

61. Having seen the Archipelago ECN in the testing phase, Goldman Sachs agreed with Putnam that it would make a large investment, on the order of tens of millions of dollars, needed for Putnam to make the enterprise a success. In contemplating the investment, it was understood that Putnam would continue to conduct the affairs of Archipelago as he had been doing, both in its provision of ECN services and in its subordination of CTA and its technological assets to the Archipelago enterprise. Similarly, it was understood that Putnam had been and would continue to conduct the affairs of CTA in its relationship to the Archipelago ECN, meaning that Putnam would maintain control of the day-to-day affairs of CTA and would not allow the fledgling Archipelago to fail for lack of access to CTA's technological assets.

62. The talks regarding this investment took place in 1997 and into 1998 at dates and times known to Defendant Goldman Sachs and unknown to Plaintiffs. Plaintiffs do not have access to this information because the talks were kept concealed from Borsellino and because Goldman Sachs, Putnam and the Townsends have destroyed or suppressed the documentation containing this information as is explained further, below.

63. Further, on information and belief, Goldman Sachs realized that Archipelago's diversion of CTA's technological assets presented an potential impediment to the investment. Goldman Sachs was aware of Archipelago's use of CTA's NASDAQ platform from having participated in the testing and, on information and belief, Goldman Sachs's deal makers would also

have learned of Archipelago's use of CTA's assets from having performed the usual due diligence associated with an investment of the magnitude of tens of millions of dollars. Goldman was not willing to invest while Borsellino still had the opportunity to learn of Archipelago and take one-third of it by enforcing his rights as a one-third shareholder of CTA. Such a contingency, if it came to pass, would have substantially impaired the value of any investment already made and would have increased the cost of buying in the future.

64. On information and belief it was, accordingly, understood and agreed that Goldman Sachs would not invest while the possibility remained for Borsellino to exercise rights in Archipelago as an owner of CTA. It was further understood and agreed that Putnam and the Townsends would therefore gain complete ownership of CTA without informing Borsellino of Goldman Sachs's willingness to invest tens of millions of dollars in Archipelago.

65. Putnam and the Townsends proceeded to carry out this scheme. In the fall of 1997, Putnam and the Townsends advised Borsellino that they no longer wanted to be in the business of operating a day-trading room. They represented that CTA could not be run as a profitable venture. As a result, in February 1998, Borsellino filed a shareholder's derivative lawsuit in state court, number 98-CH-001363, seeking an accounting.

66. Shortly after the suit was filed, Putnam and the Townsends offered to settle the suit in exchange for refunding to Borsellino the \$250,000 he had invested in CTA. In dealing with Borsellino for his interest in CTA, they affirmatively represented that CTA had not been a viable venture, and affirmatively represented that they had not diverted CTA's assets and business opportunities to any other businesses including Archipelago. All of these representations were false.

67. Based upon these representations, the parties entered into a settlement agreement on March 4, 1998, purporting to foreclose all claims that Borsellino had against Putnam or the Townsends arising out of their involvement in CTA. A judgment was entered on the settlement and the time to appeal that judgment expired in April of 1998.

68. Two months later, in June of 1998, Goldman Sachs and Archipelago entered into a letter of intent regarding an investment by Goldman Sachs. In the resulting deal, Goldman Sachs paid \$25 million in exchange for a 25% stake in Archipelago.

H. Archipelago and Goldman Sachs Have Engaged In Document Destruction To Conceal Goldman Sachs's Involvement and Liability

69. In August of 2000, Borsellino came to discover through, among other things, discussions with a former CTA trader and a former employee of Terra Nova Trading, that Putnam and the Townsends had not been forthcoming with him and that, in fact, they had diverted CTA's technological assets and profits to their own use in the development of the remote trading rooms and Archipelago.

70. Upon learning these facts, Borsellino promptly filed a second state court suit on September 25, 2000, Case No. 00-CH-13858.

71. As part of his investigation, Borsellino diligently served discovery in the second state suit on Putnam and the Townsends to learn the facts surrounding the investments by third parties in Archipelago, and also served subpoenas on those third party investors, including Goldman Sachs, seeking the same information. These requests extended to all formats in which documents are maintained, including e-mails and other electronically stored documents.

72. In late 2001, Borsellino began receiving responses to this discovery, and received Goldman Sachs's first response to the subpoena in January 2002. None of the discovery produced

by Putnam, the Townsends, or Goldman Sachs, contained any documents or emails concerning any relationship or involvement of Goldman Sachs with Archipelago created in the 1997 time frame, when Archipelago was diverting CTA's assets through the pattern of racketeering activity set out above.

73. As of June 2005, Goldman Sachs has now taken the position that all responsive documents that exist have been produced in the state case, *i.e.* that no documents exist from the 1997 time frame.

74. However, it is now apparent that Goldman Sachs, together with Putnam and the Townsends, either suppressed the documents or that these documents have been intentionally destroyed, all in an effort to conceal Goldman Sachs's relationship to the corrupt diversion of CTA's assets in the formation of Archipelago and its role in the breaches of fiduciary duties owed to the Plaintiffs. This conclusion follows from the following facts.

75. First, Goldman Sachs market makers, including Mr. Del La Rosa, in fact participated in several days worth of testing on the Archipelago ECN in January of 1997. Plaintiff learned this information for the first time in 2004 when Putnam revealed it in his deposition. It is implausible that no documents exist or existed regarding these Goldman employees' involvement in the testing.

76. Second, the claim of no documents is not believable because the relationship in the timing between when Putnam and the Townsends defrauded Borsellino into selling his shares in CTA and when Goldman Sachs entered into a formal letter of intent about investing in Archipelago shows that Goldman Sachs had an intimate awareness of the racketeering activity complained of above and its potential deleterious effect on any investment if Borsellino enforced his rights as an owner of CTA. Having been in contact with Archipelago about making a large investment for over

a year, it is not plausible that Goldman Sachs would not have investigated how Archipelago functioned as part of its due diligence and would not have created contemporaneous documents and emails thereabout.

77. Third, a memorandum created in June 1998, in or about the time of the letter of intent, recounts that Joe De La Rosa (the Goldman Sachs market maker who helped in the weekend testing of Archipelago) and others were in talks with Putnam and the Townsends no later than June of 1997 in what he referred to as the “getting to know you” stage. This memorandum was sent to John Thain, then head of technology for Goldman Sachs, later its CEO and currently CEO of the NYSE. Plaintiff received this document for the first time in Goldman Sachs’s responses to discovery in the state case.

78. Crediting this document, Goldman Sachs was in talks with Archipelago for approximately six months in 1997 at a time when Archipelago was functioning by siphoning off the assets (technological and otherwise) of CTA. Given Putnam’s deposition testimony and the fact that De la Rosa was one of the authors of the memorandum, Goldman Sachs had to have been involved in such talks in January of 1997 or earlier.

79. In either case, it is not credible that none of Goldman Sachs, Putnam or the Townsends created any contemporaneous documents or emails whatsoever in the 1997 time frame regarding Goldman Sachs in relation to Archipelago. Moreover, it is particularly unbelievable that Goldman Sachs would have been in the “getting to know you” phase of an eventual \$25 million investment and yet none of them created any contemporaneous documents, not an even a single email. The inference is that those documents were either destroyed or suppressed because they were unfavorable to Goldman Sachs and revealed the violations complained of herein.

80. On information and belief, the reason that none of the Townsends, Putnam or Goldman Sachs produced any documents from the 1997 time frame is that they jointly agreed to suppress and/or destroy such documents for the protection of co-conspirator Goldman Sachs, Townsends and Putnam.

COUNT I - RICO CONSPIRACY

81. Plaintiffs incorporate the all paragraph of the Complaint as if fully set forth herein.

82. By all of the above, Gerald Putnam, Marggwen Townsend and Stuart Townsend, acting individually and together, participated in the affairs of Archipelago and Chicago Trading & Arbitrage through a pattern of racketeering activity.

83. This racketeering activity consisted of violating 18 U.S.C. § 1343 and 18 USC § 1029(a)(2,5,7 & 9) with each trade executed by the remote trading rooms and each trade executed by Archipelago from the Summer of 1996 (when Putnam began supplying the remote day-trading rooms) through late 1997 or early 1998 (when Archipelago relocated its offices from 318 West Adams to 100 South Wacker). There were well in excess of thousands of such trades in each day of this period. Indeed, according to Archipelago, its” trading volume increase[d] to 10 million trades per day” in the 1997-1998 time frame. Putnam and the Townsends thereby violated 18 U.S.C. § 1962(c).

84. By all of the above, Defendant Goldman Sachs participated in the commission of the violations of 18 U.S.C. §§ 1029, 1343 and otherwise conspired with Putnam and the Townsends in the violation of 18 U.S.C. § 1962(c).

85. Plaintiffs have suffered damages as a direct and proximate result, including injury to business and property.

WHEREFORE, Plaintiffs demand judgment against Defendant Goldman Sachs Group, Inc., awarding actual and treble damages together with all costs and reasonable attorneys fees incurred in this action.

COUNT II - TORTIOUS INTERFERENCE WITH ECONOMIC ADVANTAGE

86. Plaintiffs incorporate the all paragraph of the Complaint as if fully set forth herein.

87. Plaintiffs had a valid business relationship with Putnam and the Townsends in CTA as well as a right to an interest in Archipelago. Defendant Goldman Sachs knew of Plaintiffs' business relationship and their right to an interest in Archipelago.

88. Defendant Goldman Sachs purposefully and illegally interfered in that relationship and in that expectancy in order that it could invest in Archipelago and reap the advantages due Plaintiffs. This interference resulted in the termination of Plaintiffs' business relationship and prevented them from realizing an interest in Archipelago.

89. Plaintiffs have been damaged as a direct and proximate result.

WHEREFORE, Plaintiffs demand judgment against Defendant Goldman Sachs Group, Inc., awarding actual and punitive damages together with all costs of this action.

COUNT III - TORTIOUS INTERFERENCE WITH FIDUCIARY RELATIONSHIP

90. Plaintiffs incorporate the all paragraph of the Complaint as if fully set forth herein

91. By all of the above, Putnam and the Townsends owed fiduciary duties to Plaintiffs, including, *inter alia*, the duty to have provided the Archipelago business opportunity to Plaintiffs and CTA. and to have made a complete disclosure of Plaintiffs' rights in Archipelago when negotiating with them to purchase their interest in CTA.

92. Defendant Goldman Sachs knew of these fiduciary duties and intentionally and unjustifiably induced their breach. These duties were actually breached, and Plaintiffs have suffered actual damages as a direct and proximate result.

WHEREFORE, Plaintiffs demand judgment against Defendant Goldman Sachs Group, Inc., awarding actual and punitive damages together with all costs of this action.

COUNT IV - CIVIL CONSPIRACY

93. Plaintiffs incorporate the all paragraph of the Complaint as if fully set forth herein

94. By all of the above, Putnam, the Townsends and Goldman Sachs entered into an agreement to unlawfully deprive Plaintiffs of their interest in CTA and, therefore, their rights in Archipelago, and/or agreed that they would acquire Plaintiffs' interest by unlawful breaches of fiduciary duties owed to Plaintiffs, including, *inter alia*, the duties to have provided the Archipelago business opportunity to Plaintiffs and CTA and to have made a complete disclosure of Plaintiffs' rights in Archipelago when negotiating with them to purchase their interest in CTA.

95. Putnam and the Townsends breached their fiduciary duties to Plaintiffs in furtherance of this conspiracy.

WHEREFORE, Plaintiffs demand judgment against Defendant Goldman Sachs Group, Inc., awarding actual and punitive damages together with all costs of this action.

COUNT V - INTENTIONAL/WILFUL AND WANTON SPOILIATION OF EVIDENCE

96. Plaintiffs incorporate the forgoing paragraphs as if fully set forth herein.

97. By all of the above, Defendant Goldman Sachs Group, Inc., acting individually and pursuant to a conspiracy with Putnam and the Townsends, intentionally destroyed evidence which was relevant and which it knew to be relevant to the claims asserted above as well as to

the discovery of the existence of those claims by Plaintiffs.

98. Defendant was well aware of the potential of the above claims and destroyed the documents intending to disadvantage Plaintiffs in proving the claims and/or discovering them in time to timely file them. Pleading in the alternative to Counts I-IV, Plaintiffs have been prevented from prevailing on their claims as a direct and proximate result of that destruction and have thus been damaged. Further, pleading in the alternative to Counts I-IV, but for the document destruction, Plaintiffs would have had a reasonable probability of succeeding and/or of timely filing their claims.

99. Additionally, or in the alternative, Defendant had a duty to preserve the evidence given its misconduct as set out above and given the nature of the documents, its own document retention policies and/or actual practices, as well as industry standards for document retention. Defendants wilfully and wantonly destroyed the documents in violation of that duty. Pleading in the alternative to Counts I-IV, Plaintiffs have been prevented from prevailing on their claims as a direct and proximate result and have thus been damaged. Further, pleading in the alternative to Counts I-IV, but for the document destruction, Plaintiffs would have had a reasonable probability of succeeding and/or of timely filing their claims.

WHEREFORE, Plaintiffs demand judgment against Defendant Goldman Sachs Group, Inc., awarding actual and punitive damages together with all costs of this action.

COUNT VI- NEGLIGENT SPOILIATION OF EVIDENCE

100. Plaintiffs incorporate the forgoing paragraphs as if fully set forth herein.

101. By all of the above, Defendant Goldman Sachs Group, Inc., acting individually and pursuant to a conspiracy with Putnam and the Townsends, negligently destroyed evidence

which was relevant and which it knew or should have known was relevant to the claims asserted in Counts I-IV as well as to the discovery of the existence of those claims by Plaintiffs.

102. Defendant had a duty to preserve the evidence given its misconduct as set out above and given the nature of the documents, its own document retention policies and/or actual practices, as well as industry standards for document retention.

103. Pleading in the alternative to Counts I-IV, Plaintiffs have been prevented from prevailing on their claims as a direct and proximate result of that destruction and have thus been damaged. Further, pleading in the alternative to Counts I-IV, but for the document destruction, Plaintiffs would have had a reasonable probability of succeeding/timely discovering their claims.

WHEREFORE, Plaintiffs demand judgment against Defendant Goldman Sachs Group, Inc., awarding actual and punitive damages together with all costs of this action.

JURY DEMAND

Plaintiffs demand a jury trial for all claims so triable.

RESPECTFULLY SUBMITTED,

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