Defendant-Appellant, Theflyonthewall.com, Inc. ("Appellant" or "TheFly"), respectfully submits this motion for a stay pending appeal of the Permanent Injunction dated March 18, 2010 (SDNY Docket No. 138) entered by the United States District Court for the Southern District of New York. [1]

The Permanent Injunction requires Appellant, an Internet based financial news site (*www.theflyonthewall.com), inter alia*, to delay its reporting of headlines concerning analyst Recommendations by plaintiff investment banks, Barclays Capital, Inc., Merrill Lynch, Pierce, Fenner & Smith Incorporated, and Morgan Stanley & Co., Incorporated ("Appellees" or the "Firms"). The District Court's injunction is premised on a finding that TheFly violated the New York State law of hot-news misappropriation based on the seminal Supreme Court decision in *International News Service v. Associated Press*, 248 U.S. 215 (1918) ("*INS*").[2]

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1(b), TheFly hereby certifies that it (i) has no corporate parent, and (ii) no publicly-owned corporation owns 10% or more of its equity stock.

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[1] In support of this motion, Appellant submits the Declaration of its counsel, Glenn F. Ostrager (the "Ostrager Decl."), and Declaration of Ron Etergino, Appellant's president and CEO (the "Etergino Decl."), both dated May 10, 2010.

[2] Appellant does not seek a stay of the Permanent Injunction as it relates to copyright claims asserted by Barclays Capital and Morgan Stanley.

STATEMENT OF APELLATE JURISDICTION

This Court has jurisdiction over this Appeal under 28 U.S.C. § 158(d), and this Motion is made pursuant to Fed. R. App. P. 8(a)(2). On March 18, 2010 and March 22, 2010, the District Court issued the Permanent Injunction, Opinion and Order (SDNY, Docket No. 136) ("March 18 Op.") and Judgment (SDNY, Docket No. 140) being appealed from here. On April 9, 2010, Appellant filed a Notice of Appeal (SDNY, Docket No. 157).

Thereafter, on April 13, 2010 Appellant moved before the District Court to stay the injunction or limit its scope to non-public domain information pending this appeal. By Opinion and Order dated May 7, 2010 (SDNY, Docket No. 187)("May 7 Op."), the District Court denied Appellant's motion to stay on grounds that Appellant did not demonstrate (i) that it was likely to succeed on appeal, (ii) that the Permanent Injunction is causing Appellant irreparable injury, (iii) that the Firms would not be substantially injured by a stay, or (iv) that the public interest lies in Appellant's favor. Copies of the Permanent Injunction, the May 7 Op., the March 18 Op. and the Judgment are annexed to the Ostrager Decl. as Exs. A-D.

NOTIFICATION; DISCLOSURE OF OPPONENT'S POSITION

Pursuant to Fed. R. App. P. 8(a)(2)(C) and Local Rule 27.1, Appellant's counsel notified the Firms' counsel of this motion. The Firms' counsel advised that the Firms oppose the relief requested and will file a response to the motion.

PRELIMINARY STATEMENT

Appellees are investment banking firms. TheFly is an on-line financial news service. This case presents claims of "hot-news" misappropriation based on *INS* and relates to Appellant's publication of headlines reporting the fact of a recommendation set forth in analyst research reports published by the Firms ("Recommendations"). TheFly gathers the facts set forth in its headlines from public sources. TheFly's headlines are limited to brief snippets of information of the type: "EQIX: Equinox initiated with a Buy at BofA/Merrill. Target $110" and do not include the Firms' underlying analytical research.

The District Court held that TheFly's conduct constituted hot-news misappropriation finding that it engaged in "free-riding activity that is directly competitive with the Firms' production of time-sensitive information, thereby substantially threatening their incentive to continue in the business." (March 18 Op., p. 87) The Permanent Injunction embargoes all news reports concerning the Firms' Recommendations until 10:00 a.m. EST for Recommendations published before the New York Stock Exchange opens, and postponing publication for at least two hours for Recommendations published by the Firms after the New York Stock Exchange opens. To protect "legitimate" news reporting and address First Amendment constraints, the Permanent Injunction permits TheFly to report "after 9:30 a.m. one of the Firms' Recommendations in the context of independent

analytical reporting on a significant market movement in a security that has already occurred that same day." (Permanent Injunction, ¶ 3, Ostrager Decl., Ex. A)

We show that the embargo has a substantial adverse effect on the conduct of Appellant's business. The Permanent Injunction also adversely impacts the public interest in unrestrained access to financial news available in the public marketplace. *See New York State Restaurant Assoc. v. New York City Board of Health*, 545 F. Supp.2d 363, 367-368 (S.D.N.Y. 2008).

TheFly's reporting of public information is not wrongful under New York State law. The District Court erred, *inter alia,* in finding that the Firms – investment banks – are in direct competition with Appellant – a news service – in a primary market, that Appellant is free-riding on Appellees' Recommendations, and that Appellant's publication of its newsfeed (and the financial news media in general) so reduced the Firms' incentives to generate equity research and threatens the viability of their businesses.

We show that in granting the Permanent Injunction, the District Court improperly conflated the fifth element of *NBA*, a showing of a "substantial threat," with the requirement in equity that the Firms make a showing of actual irreparable harm. This Court in *Colleen M. Salinger v. Frederick Colting*, Docket No. 09-02878, dated April 30, 2010 ("Salinger, Slip. Op.")(copy annexed as Ostrager Decl., Ex. E) directs that "[t]he court must not adopt a 'categorical' or 'general'

rule or presume that plaintiff will suffer irreparable harm". *Salinger*, Slip.Op. 18. Absent from the record in this case, other than a presumption of "obvious" damage, is a showing of irreparable injury attributable to Appellant as distinct from other market factors. (*See Salinger,* Slip Op. 73) For this reason, even if the Court sustains the District Court's finding of liability for hot-news misappropriation on appeal, there is no basis in the record for issuance of an injunction.

Appellant requests that the Court stay the injunction directed to the hot-news claims during appeal. As an alternative to a stay, Appellant requests that the Court limit the scope of the injunction and permit Appellant to report the Firms' Recommendations that are first published by a "mainstream" news service. Appellant proposes that "mainstream" be defined as consisting of the following news services: Bloomberg, Thomson Reuters, Dow Jones, The New York Times, The Wall Street Journal, and CNBC.

BACKGROUND

Appellant is a publisher of an Internet subscription news service that, since 1998, has been reporting financial news and information, including upgrades, downgrades, and initiations by Wall Street Investment firms. Appellant's Trial Exhibit DTA-1, Testimony Affidavit of Ron Etergino, ¶¶ 4, 11 ("Etergino Trial Test.")(Ostrager Decl., Ex. F) Appellant also publishes original content news articles about the financial markets that are not at issue in this case. (Ex. F,

Etergino Trial Test., ¶ 11) Appellant's news sources include mainstream news media, on-line financial news competitors, and communications with trading desks, money managers and brokers throughout the industry. (*Id.* at ¶¶ 6, 29) Appellant's headline reports concerning the Firms' Recommendations consist of brief factual statements and do not include the Firms' underlying analytical research. (*Id.* at ¶ 16) Information of this type is widely disseminated throughout Wall Street by the Firms' competitors, clients, traders and the like through e-mail and instant message blasts. (*Id.* at ¶¶ 14, 20, 21, 26, 28, 29, 48)

The District Court ruled that TheFly's news reporting activities, as they related to the Firms' research Recommendations, constituted hot-news misappropriation under the common law of New York. The District Court's decision rested primarily on this Court's *NBA* decision. The District Court found that the Firms' Recommendations, were protectable under this Court's narrow hot-news doctrine even if the Recommendations were "already in the public domain by the time Fly reports it." (March 18 Op., p. 61)

The District Court found that the Firms' Recommendations was a valuable property right that should be protected against anticompetitive news services such as TheFly to assure its continued production for the benefit of the public. The Court stated that Appellant and other mainstream media giants like "Bloomberg,

Thomson Reuters, or Dow Jones" are not authorized to disseminate the Firms' Recommendations. (March 18 Op., p. 24)

The District Court further held that the parties were competitors even though the Firms testified that are not in the business of publishing financial news to the public. The Firms disseminate equity Recommendations to drive their primary business, which is brokerage. Under "extra elements" analysis of this Court in *NBA*, the Firms and District Court sweepingly defined competition to encompass the financial news reporting practices of mainstream media and Internet services.

The District Court also rejected Appellant's argument that the Firms' had presented no evidence of an anti-competitive effective or substantial threat to the viability of their businesses to establish violations of hot-news doctrine. The Firms presented no survey, expert or client testimony that TheFly's publication of summary Recommendations, as distinct from the Firms' comprehensive research reports, harmed the Firms' brokerage businesses. The District Court reached this conclusion notwithstanding the Firms acknowledgment that other market factors, including the downturn in the economy, the Global Analyst Settlement, and discount brokers had impacted the Firms' businesses.

The District Court rejected Appellant's argument that the Firms had not shown an entitlement to injunctive relief. Appellant argued that there was no showing of "actual harm" or irreparable injury to support an injunction, that the

Firms had tolerated the practices complained of in the Complaint by mainstream and other media for many years, and Appellant was an inconsequential actor in financial news business. Finally, Appellant asserted that the purpose of the hot-news doctrine purpose is to safeguard the public interest in assuring that the news is published, and that the public interest is not served by prior restraint.

The District Court concluded that the Firms were entitled to a Permanent Injunction to remedy Appellant's misappropriation of the Firms' "commercially valuable, time-sensitive equity research recommendations and analyses." To protect "legitimate" news reporting and address First Amendment constraints, the Permanent Injunction permits Appellant to report "after 9:30 a.m. one of Appellees' Recommendations in the context of independent analytical reporting on a significant market movement in a security that has already occurred that same day." (Ostrager Decl., Ex. A, ¶ 3)

On April 13, 2010, Appellant moved before the District Court to stay the injunction or limit its scope to non-public information, pending this appeal. (SDNY, Docket Nos. 161-164 and 167) On May 7, 2010, the District Court denied this motion. On May 4, 2010, Appellant filed an emergency motion before this Court for an expedited appeal.

ARGUMENT

APPELLANT SHOULD BE GRANTED A STAY OR MODIFCATION OF INJUNCTION PENDING APPEAL

A motion to stay or modify a permanent injunction is governed by Fed.R.Civ. 62(c). Issuance of a stay pending appeal is discretionary and equitable, requiring the balancing of four factors: (i) the movant's likelihood of prevailing on the merits on appeal; (ii) whether the movant will be irreparably injured absent a stay; (iii) whether the issuance of the stay will substantially injure other interested parties; and (iv) where the public interest lies. *See In re World Trade Center Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007); 12-62 *Moore's Federal Practice* § 62.06 (2010). The failure of one factor is not dispositive. Rather, "the degree to which a factor must be present varies with the strength of other factors." *Id.*; *Mohammed v. Reno,* 309 F.3d 95, 101 (2d Cir. 2002). Here, all factors strongly favor a stay pending an appeal.

A. Appellant is Likely to Succeed on the Merits

1. TheFly's Headlines Do Not Constitute Hot-News Misappropriation

In *NBA,* this Court detailed the extra elements – those in addition to the elements of copyright infringement – that allow a "hot-news" misappropriation claim to survive preemption. These elements are: (1) the plaintiff generates or collects information at some cost or expense; (2) the value of the information is

highly time sensitive; (3) the defendant's use of the information constitutes free-riding on the plaintiff's costly efforts to generate or collect it; (4) the defendant is in direct competition with a product or service offered by the plaintiff; and (5) the ability of other parties to free-ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened. *NBA*, 105 F.3d at 845, 852.

The District Court held, contrary to the *NBA* decision, that TheFly's conduct constituted hot-news misappropriation finding that it engaged in "free-riding activity that is directly competitive with the Firms' production of time-sensitive information, thereby substantially threatening their incentive to continue in the business" (March 18 Op., p. 87) [3]

The Permanent Injunction is based on finding that the parties are direct competitors even though

- it was undisputed that the parties are not competitors in the Firms' primary business – providing investment banking and brokerage services – and that the Firms' research activities are collateral to the Firms' primary business of generating commissions. (March 18 Op., pp. 11, 15-16, 66-69)

[3] The District Court acknowledged at trial that complexity is presented by the conflicting interests in safeguarding the parties' respective interests, and the public interest in unrestrained access to information (March 18, 2010 Opinion, p. 79-80), which favors maintaining the *status quo* and staying the Permanent Injunction. *See Carvel Corp. v. Eisenberg*, 1988 U.S. Dist. LEXIS 12043, *3 (SDNY 1988); *See also United States Golf Assoc. v. Andres Systems*, 749 F.2d 1028, 1037-1038 (3rd Cir. 1984).

- TheFly is a financial news service that publishes factual information about the financial markets and does not provide brokerage, investment advice, or other services. (March 18 Op., p. 26)

The District Court held that the Firms made a showing of sufficient harm (both to avoid federal preemption and to justify a news embargo) based on speculative, lay opinion testimony of the Firms' research executives, that TheFly's publication of its newsfeed (and by the financial news media in general) presents a substantial threat to the Firms' businesses. Absent from the record is any expert testimony or survey evidence to demonstrate a substantial threat to the Firms' businesses. (See March 18, 2010 Opinion , p. 86, f. 39)

In relying on speculation as to what might happen in the future, the District Court

- departed from *NBA's* holding that a misappropriation plaintiff must prove by a preponderance of the evidence that free-riding by a defendant poses a "threat to the very existence of the product or service provided by the plaintiff." *NBA, supra. at* 853.

- departed from *NBA* in finding that the "public domain" status of the Firms' research and its wide dissemination is not relevant to the determination of whether TheFly had wrongfully taken from the Firms' research publications. (Slip Op., p. 62, f. 34); *See NBA, supra. at* 851.

- discounted the undisputed evidence that other factors in the marketplace have threatened the production of equity research including the extended financial recession; the Global Research Analyst Settlement between the SEC and State regulators in April 2003; and the availability of discount trading platforms. (Slip Op., p. 75-76)

- discounted the failure of the Firms to present any survey evidence to demonstrate the threat to their research businesses, or any evidence of harm attributable to TheFly's news publication. *See Victor Mosley v. Secret Catalogue,* 537 U.S. 418, 434 (2003) ("Whatever difficulties of proof may be entailed, they are not an acceptable reason for dispensing with proof of an essential element of a statutory violation.")(*See* Slip Op., p. 86, f. 39)

2. <u>The Firms Have Not Established Entitlement to Injunctive Relief</u>

This Court's recent decision in *Colleen M. Salinger v. Fredrick Colting,* Docket No. 09-2878, dated April 30, 2010 (Ostrager Decl., Ex. E) sets forth a change in the standard governing the grant of injunctive relief in this Circuit that requires the Permanent Injunction be stayed.

In *Salinger,* this Court held that the Supreme Court's decision in *eBay, Inc. v. MercExchange,* 547 U.S. 388 (2006), which articulated a four-factor test as to when an injunction may issue, applies to preliminary injunctions issued on the basis of alleged copyright infringement. The Court further observed that *eBay* strongly indicates that principles of equity it employed are the presumptive standard for injunctions in any context. (*Salinger* Slip Op. 15) The governing equitable factors are as follows:

> According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public

interest would not be disserved by a permanent injunction.

Salinger Slip.Op. 14 (*quoting, eBay,* 547 U.S. at 391)

Under the *Salinger* standard a showing of hot-news misappropriation does not in and of itself meet the requirement for an entitlement to injunctive relief. "[P]laintiffs must show that, on the facts of their case, the failure to issue an injunction would actually cause irreparable harm." *Salinger,* Slip.Op 20 (emphasis added) At trial, TheFly argued that there was no showing of actual harm sufficient to justify an injunction. The Court held:

> Fly . . . misapprehends the nature of what must be proved to sustain the fifth element and win injunctive relief. The Firms do not need to show that Fly has directly caused them actual, quantifiable damage – rather, they must show that the free-riding, if left unrestrained, "would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened." *NBA*, 105 F.3d at 845 (emphasis added). INS itself required no direct proof of lost profits in order to sustain a permanent injunction against unfair competition. INS, 248 U.S. 241 (noting the "obvious results" of INS's conduct in terms of its effect on AP's profitability). (Slip.Op. 73-74)

Salinger directs that "[t]he court must not adopt a 'categorical' or 'general' rule or presume that plaintiff will suffer irreparable harm". (*Salinger*, Slip.Op. 18) Absent from the record in this case, other than a presumption of "obvious" damage, is a showing of irreparable injury attributable to Appellant as distinct from other factors. (*See Salinger,* Slip Op. 73)

The Firms also failed at trial to establish other elements of the four-factor

eBay standard for equitable relief. Prior to trial, the Firms waived their claims for actual damages to the extent necessary to avoid a jury trial. This waiver does not excuse the Firms' failure to present evidence of damage, and does not weigh in favor of injunctive relief. *Salinger* cautions that a court of equity must carefully consider the public interest before granting the extraordinary remedy of an injunction. (*Salinger*, Slip.Op. 17, f. 8) Here, the public has an important interest in unrestrained access to information in the public domain. *See Eric Eldred v. John D. Ashcroft,* 537 U.S. 186, 219 (2003). "The public's interest in free expression . . . is significant and is distinct from the parties' speech interests." (*Salinger,* Slip.Op. 22); *See also,* Note, *Nothing But Internet,* 110 HAVR.L.REV. 1143, 1157-58 (1997)("The First Amendment protects not only the right of speakers to engage in expressive activity, but also the right of 'listeners,' or the public at large, to receive information.").[4]

[4] In the May 7, 2010 Opinion, The District Court found that Appellant waived its First Amendment defense to the hot-news misappropriation claims. However, Appellant raised the First Amendment defense in its Answer, the Summary Judgment motions, its defense of the hot-news misappropriation claims in the Pre-Trial Order and at trial. Appellant argued that its headlines report news in the public domain of public significance, and therefore it is entitled to publish without restraint. All factual issues on this defense were fully addressed at trial and, as Appellees properly observed, were considered by this Court in framing the Permanent Injunction with an exception for contextual, non-systematic news reporting after the market opens. (Appellee's Opposition Memo to Motion to Stay before the District Court, p. 4)(Ostrager Decl., Ex. H) At trial, Appellees' counsel, Benjamin Marks, stated: "Fly's sole defense is to wrap itself in the mantle of the

B. The Appeal Presents Substantial Issues of Significant Public Interest

In *Salinger*, this Court held that a court must ensure that the "public interest would not be disserved" by the issuance of an injunction. *Salinger* Slip. Op., p. 18. Similarly, in *NBA*, this Court analyzed the viability of the NBA's state law misappropriation claim in light of the Copyright Act's preemptive effect. *Id.* at 845. There is a public interest in both the production of equity research, and widespread access to information is critical to "the progress of Science and the useful Arts," U.S. Const. Art. I, § 8, cl. 8. Section 102(b) of the Copyright Act delineates the scope of copyright in these explicit terms: "In no case does copyright protection for an original work of authorship extend to any idea, procedure,

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media and implicitly in the First Amendment, and claim that its [newsfeed] … is a legitimate business practice." (Trial Tr. 652:25 – 653:7; *See also* Trial Tr. 580:4-9)(Ostrager Decl., Ex. G)(the Court asked: "why isn't the reporting of market movement, when it is linked to a recommendation … always allowed … and how would any injunction address that so that [that] legitimate reporting would not be captured?") Appellant's identification of defenses for trial in the Pre-Trial Order and briefing was intended to be consistent with this free press defense. The First Amendment defense presents a pure question of law fully supported by the record in this case and should be considered by this Court on this motion for a stay pending appeal. *See, e.g., Bose Corp. v. Consumers Union of United States, Inc*., 466 U.S. 485, 515 (1984)("in cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression."); *See also Coogan v. Smyers,* 134 F.3d 479, 487 (2d Cir. 1998); *Empresa Cubana del Tabaco v. Culbro Corp*., 399 F.3d 462, 471 (2d Cir. 2005); *In Re: Charles Atwood Flanagan v. Bonnie C. Mangan, Trustee*, 503 F.3d 171, 182 (2d Cir. 2007).

process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. 102(b).

The Supreme Court's most forceful statement of this policy of the copyright-patent clause is found in *Feist Publications, Inc. v. Rural Telephone Service Co*., 499 U.S. 340, 349-50 (1991): "copyright assures authors the right to their original work, but encourages others to build freely upon the ideas and information conveyed by a work." For this reason, "all facts – scientific, historical, biographical, and news of the day -- … 'may not be copyrighted and are part of the public domain available to every person.'" *Id*. at 348, *quoting Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1369 (5th Cir. 1981). [5]

TheFly's brief factual Headlines are not challenged on grounds that they infringe the Firms' copyright rights. The deliberate federal policy to preserve a public domain consisting of the noncopyrightable contents (such as facts and ideas) of copyrightable works and issues of federal preemption are implicated by the injunction, which extends to noncopyrightable aspects of the Firms' Recommendations. *Feist Publications*, 499 U.S. at 348.

[5] It is for this reason that this Court has only "begrudgingly" recognized a narrow "hot news" INS-type claim survives preemption. *NBA supra. at* 851 (citing *Financial Information, Inc. v. Moody's Investment Service, Inc.*, 808 F.2d 204, 208 (2d Cir. 1986), *cert. denied*, 484 U.S. 820 (1987).

The public's interest is clearly implicated by the embargo of financial news relating to Recommendations in the "public domain" and weighs heavily in favor of granting a stay in order to allow meaningful review by the Second Circuit of issues presented by this action.

C. Appellant Will Suffer Irreparable Harm

In fashioning an injunction, the District Court excluded from the embargo "legitimate news reporting" which is protected by the First Amendment. (Trial Tr. lines 4-9, p. 580) Indeed, the District Court expressly provided an exception in the injunction for "Non-Systematic, Contextual Reporting After the Market Opens." (March 18 Op., p. 87) At trial, it was not disputed that it has been a long established practice to report the Firms' Recommendations. (*See* March 18 Op., pp. 35, 61-62; *See also* Etergino Decl. ¶ 3) Appellant submits that the District Court's exception in the injunction to protect legitimate news reporting does not comport with the First Amendment insofar as it embargos financial news which is in the "public domain."

Appellant submits that recommendations of Wall Street firms are legitimate news and highly significant to public in general. The Court ordered embargo of Appellant's news service constitutes irreparable harm of the highest order. The Supreme Court has held that "[t]he loss of First Amendment freedoms for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v.*

Burns, 427 U.S. 347, 373 (1976). The First Amendment protects the news media publication of lawfully obtained information of public significance. *See Bartnicki v. Vopper*, 532 U.S. 514, 527-28, 533-35 (2001); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103-06 (1979); *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317-18 (1994) (staying an injunction that prohibited CBS from broadcasting video footage documenting unsanitary practices in the meat industry, finding that such prior restraint caused "irreparable harm to the news media that is intolerable under the First Amendment.")

Absent a stay, Appellant will also suffer irreparable harm because it is at a competitive disadvantage in the on-line financial news industry. (Etergino Decl., ¶ 2) It is manifest that substantial adverse financial consequences to Appellant's business are certain to become significant as time progresses. (Etergino Decl. ¶ 6)

D. <u>The Firms Will Not Be Substantially Harmed by The Relief Sought</u>

In contrast to the substantial irreparable harm that Appellant will suffer absent a stay, the Firms will suffer no harm. Appellant is a relatively small news service with a limited subscriber base. The District Court reserved jurisdiction to reevaluate the Permanent Injunction, and permit Appellant to move to modify or vacate the injunction if "it can demonstrate that the Firms have not taken reasonable steps" to restrain unauthorized publication of the Firms' Recommendations. (March 18 Op., p. 88) Until such time as the Firms reign-in

the now widespread reporting practices of the industry, Appellant presents no harm to the Firms' research departments and brokerage services.

Appellees cannot be heard to claim prejudice where Appellant's request is limited to maintaining the *status quo* that the Firms have acquiesced in for at least a decade. Appellant requests no more than a limited period for review by this Court of the substantial and complex legal issues in this case. Further, a stay to address the equities pending an appeal does not in any respect diminish the force of the District Court's comprehensive March 18, 2010 Opinion, and will therefore not effect the Firms' efforts to reign in similar conduct by other entities.

In sum, we submit that there are substantial equities favoring a stay of the Court's permanent injunction pending appeal. It simply cannot be that the standard for the extraordinary remedy of a permanent injunction can be met by the Firms' assertions of substantial threat without any showing of actual quantifiable injury. *See Salinger*, *supra*.

E. The Court Should Grant Relief Without the Posting of a Supersedeas Bond

Under Fed. R. Civ. P. 62(c), "a supersedeas bond provides compensation for those injuries which can be said to be the natural and proximate result of the stay." *Carolina Shipping Ltd. v. Renaissance Ins. Group Ltd*., 2009 U.S. Dist. LEXIS 7769 (S.D.N.Y. Feb. 2, 2009) *quoting Moore v. Townsend*, 577 F.2d 424, 427 (7th Cir. 1978). *See* Fed. R. App. P. 8(a)(2)(E). As shown above, the Firms will not

suffer any harm if this Court stays the injunction at least until the Firms reign in the wide-spread news reporting practices they complain of in this action. There is a substantial economic disparity between the parties (March 18 Op., p. 45), and the requirement of a bond will impose upon Appellant a clear financial strain. *See Carvel Corp. v. Eisenberg*, 1988 U.S. Dist. LEXIS 12043 *5 (S.D.N.Y. 1988).

CONCLUSION

For foregoing reasons, the Court should enter an order staying the Permanent Injunction pending appeal and grant such further relief the Court deems appropriate.

Dated: New York, New York
May 10, 2010

OSTRAGER CHONG FLAHERTY
& BROITMAN P.C.

By: /Glenn F. Ostrager/
Glenn F. Ostrager
Joshua S. Broitman

570 Lexington Avenue
New York, New York 10022-6894
(212) 681-0600

Attorneys for Defendant-Appellant
Theflyonthewall.com, Inc.